Supreme Court, U.S.
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In the Supreme Court of the United States

AMERICAN CRYSTAL SUGAR COMPANY,
Petitioner,

v.

THE AMALGAMATED SUGAR COMPANY LLC,
Respondent,

and

THOMAS VILSACK, UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

David P. Bunde
Counsel of Record
Emily E. Duke
Sarah C.S. McLaren
Timothy M. O'Shea
FREDRIKSON & BYRON, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, Minnesota 55402-1425
(612) 492-7000

Counsel for Petitioner

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QUESTIONS PRESENTED

Twenty-five years ago, this Court set out the standard by which courts review decisions of administrative agencies in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Earlier this year, the Ninth Circuit not only failed to follow *Chevron*, but created a new rule which, if upheld, will substantially undercut the concept of *Chevron* deference.

This case involves the USDA's treatment of Pacific Northwest Sugar Company, a financially troubled sugar processor. The issue is whether the USDA should have declared Pacific to have "permanently terminated" operations. If so, the USDA would have been required to withdraw Pacific's marketing allocation (essentially Pacific's right to sell a certain amount of sugar in the United States).

1. Did the Ninth Circuit exceed its authority in creating an exception to *Chevron* in cases of potential agency self interest?

2. Did the Ninth Circuit overstep its role by holding that the USDA should have acted to declare that Pacific had permanently terminated operations?

3. Was the USDA's decision to transfer Pacific's marketing allocation to another sugar processor (following the sale of Pacific's assets) based on a permissible interpretation of the Agricultural Adjustment Act?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court, Petitioner, American Crystal Sugar Company, states that it has no parent corporation and no publicly held company owns ten percent or more of American Crystal Sugar Company's stock.

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PETITION FOR A WRIT OF CERTIORARI

American Crystal Sugar Company requests that this Court grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's original opinion is reported at 555 F.3d 816 (9th Cir. 2009) and is reprinted at Pet. App. 30. A timely petition for panel rehearing was denied and an amended opinion substituted by order dated April 6, 2009. The amended opinion is reported at 563 F.3d 822 (9th Cir. 2009) and is reprinted at Pet. App. 1.

The District Court's opinion is reprinted at 2007 WL 2612675 (D. Idaho Sept. 6, 2007) and at Pet. App. 56.

The decision of the Judicial Officer of the United States Department of Agriculture is reprinted at Pet. App. 69.

The decision of the Administrative Law Judge of the United States Department of Agriculture as reprinted at Pet. App. 100.

STATEMENT OF JURISDICTION

The Ninth Circuit filed its original decision on February 11, 2009. A timely petition for rehearing en banc was denied April 28, 2009. Pet. App. 144. This court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Agricultural Adjustment Act, 7 U.S.C. §§ 1359aa-1359ee, reprinted at Pet. App. 146.

7 C.F.R. § 1435.2, reprinted at Pet. App. 165.

STATEMENT

Refusing to grant *Chevron* deference, the Ninth Circuit reversed the District Court and overturned the USDA's interpretation of the 2002 Farm Bill (the "Act").[1] The Ninth Circuit's decision conflicts with the D.C. Circuit and undercuts this Court's decision in *Chevron*.

In 2003, American Crystal Sugar Company purchased all of the assets of Pacific Northwest Sugar Company, a struggling processor located in Washington state. Pursuant to the Act and upon the approval of the USDA, American Crystal was then granted the seller's marketing allocation. (Under the Act, a marketing allocation is essentially the right of a beet sugar processor to sell a designated amount of sugar each year, i.e., a share of the beet sugar market).

Respondent, The Amalgamated Sugar Company, challenged this allocation transfer, arguing that the USDA should have divided the allocation among all the country's processors pro rata, rather than transferring it to American Crystal. But the law provides that when a processor buys all the as-

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[1] The Agricultural Adjustment Act of 1938, as amended by the Farm Security and Rural Investment Act of 2002. 7 U.S.C. §1359aa *et seq*.

sets of another processor, the buyer will receive the seller's allocation.

The dispute here is whether the USDA should have declared Pacific to have "permanently terminated" operations. If so, the USDA would have been required to withdraw Pacific's marketing allocation and divide it pro rata among all the country's beet sugar processors. The parties agree that Pacific was suffering severe financial problems, but disagree as to whether Pacific had given up hope of ever resuming operations.

Congress did not provide any guidelines regarding when a sugar processor is deemed to have permanently terminated operations. In cases where a processor is unable to use its entire allocation, however, Congress did provide the USDA with discretion to temporarily reassign a processor's allocation to other processors.

The USDA allowed Pacific to retain its allocation during the first year of the Act to allow it to attempt to resume operations. At the same time, the USDA used its expertise and discretion to temporarily reassign Pacific's allocation.

Pacific's financial problems were well known within the industry. A number of processors, including Amalgamated, had considered purchasing Pacific's assets. After months of negotiations, American Crystal succeeded in reaching a tentative agreement to purchase Pacific's assets. Before concluding the purchase, American Crystal consulted with the USDA and received government approval for this transaction. Only after structuring the purchase exactly as the USDA had requested, and being assured by the USDA that the transaction would result in a

transfer of Pacific's marketing allocation, did American Crystal conclude this purchase.

After approving Pacific's sale to American Crystal, the USDA permanently transferred Pacific's allocation. On appeal, both the Judicial Officer for the USDA (the highest level of review within the agency) and the federal District Court found that the transfer was lawful.

The Ninth Circuit refused to apply *Chevron*, holding that Pacific should have been found to have permanently terminated operations, thus voiding the sale to American Crystal. The Ninth Circuit's decision rests initially on its determination that key statutory terms, including "processor" and "permanently terminated," are unambiguous. Not only does the Court of Appeals' interpretation conflict with that of the agency and the District Court, but it renders key statutory provisions meaningless.

Moreover, the Ninth Circuit decision conflicts with Supreme Court precedent. Courts must defer to an agency's reasonable interpretation of a statute when the statute is silent on the precise issue at hand or is ambiguous. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). In this case, the Ninth Circuit substituted its own judgment for that of the USDA.

The Ninth Circuit also created a broad new exception to *Chevron*, by holding that an agency's statutory interpretation must be subjected to greater scrutiny when the agency has a potential self interest in how it administers or interprets a statute. When such a self interest appears and when the agency construction is "arguably inconsistent" with Congressional intent, the Ninth Circuit would withhold *Chev-*

ron deference. In so doing, the Ninth Circuit looked to arguments never suggested by any party, stepped outside its role as an error-correcting court, and created a conflict with the D.C. Circuit on the issue of potential agency self interest.

I. Statutory Background.

A. The Act Sets Up a System Whereby Sugar Producers Receive a Marketing Allocation.

Sugar marketing is governed by the Agricultural Adjustment Act of 1938, as amended by the Farm Security and Rural Investment Act of 2002 (the "Act"). 7 U.S.C. § 1359aa *et seq.* Pursuant to the Act, the USDA implemented a marketing allotment program for sugar beginning in October 2002.

This program grants each beet sugar processor an allocation based on the amount of sugar the processor produced from 1998 through 2000. It is unlawful for processors to sell more sugar in the U.S. than their allocation allows. Each processor received its initial allocation on October 1, 2002, the beginning of the first crop year under the Act.[2] Thereafter, these allocations remain fixed unless the USDA takes some action to alter the allocation pursuant to the Act.

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[2] The percentage of allocation that each processor is assigned remains constant. However, the actual amount of sugar to be marketed by each processor under the allocation varies from year to year, depending on the Overall Allotment Quantity (i.e., the total amount of sugar allowed to be sold by all domestic producers in the U.S.) as announced by the USDA for each year.

B. The Statute Allows the USDA to Temporarily Reassign a Processor's Allocation When That Processor is Unable to Fulfill Its Allocation.

Congress designed this allocation system to be predictable, yet flexible. Each processor knows in advance how much sugar it will be allowed to sell in a given year and can make plans accordingly. The USDA has discretion to temporarily reassign a processor's allocation when the processor is unable to market all of its allocation during a particular crop year. 7 U.S.C. § 1359ee(b)(2).

C. The Statute Requires the USDA to Transfer a Processor's Allocation When That Processor Sells All of Its Assets to Another Processor.

If a processor buys "all of the assets" of another processor, the USDA must transfer the seller's allocation to the buyer.[3] 7 U.S.C. § 1359dd(b)(2)(F). The Act does not specify whether the asset sale must be those assets that the processor has at the time or those assets that the processor may have owned in the past.

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[3] "If a processor of beet sugar (or all of the assets of the processor) is sold to another processor of beet sugar, the Secretary shall transfer the allocation of the seller to the buyer unless the allocation has been distributed to other sugar beet processors under subparagraph (E)." 7 U.S.C. § 1359dd(b)(2)(F).

D. The Statute Requires the USDA to Eliminate and Redistribute a Processor's Allocation When That Processor Permanently Terminates Operations.

The Act requires the USDA to eliminate and redistribute a processor's allocation to all the other beet sugar processors pro rata if the processor has "permanently terminated operations (other than in conjunction with a sale or other disposition of the processor or the assets of the processor)." 7 U.S.C. § 1359dd(b)(2)(E). The Act does not define when a processor has permanently terminated operations or how long a processor's financial difficulties must continue in order to rise to the level of permanent termination.

II. Factual Background

A. Pacific Received An Initial Allocation That the USDA Then Temporarily Reassigned to Other Processors.

Pacific earned its initial allocation by processing sugar during 1998-2000. Pursuant to the statute, in October 2002, the Commodity Credit Corporation ("CCC") – part of the USDA – made the initial allocations. Pacific received a 2.692% share of the beet sugar market allotment. AR, Vol. 9, AMAL-SM 78.[4]

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[4] "AR" refers to the administrative record.

Because Pacific had stopped production in 2001 due to serious financial difficulties, the USDA temporarily reassigned Pacific's 2002 allocation, pursuant to Section 1359ee(b)(2). Amalgamated received a large share of this redistributed allocation. Tr. Sept. 21, pp. 52:6-53:16, Tr. Oct. 4, pp. 178:4-179:16.[5]

B. Despite Severe Financial Problems, Pacific Never Permanently Terminated Operations.

Pacific was deeply in debt, had defaulted on its loans, laid off employees, sold equipment, and defaulted on its lease. Pet. App. 5 - 6. Nonetheless, Pacific had not given up hope of resuming operations. It was diligently searching for investors and/or partners. From 2001 to 2003, Pacific negotiated with the majority of the sugar industry and other prominent agricultural companies, including Cargill and General Mills, seeking to resume operations. Tr. Sept. 23, pp. 15:2-18:2, 90:13-101:8; Tr. Sept. 22, pp. 90:2-102:16. Pacific even petitioned the USDA during 2002-03 to increase its allocation. AR, Vol. 5, ACS-23. By July 2003 (just 10 months into the first year of the new Act), Pacific reached an agreement (subject to USDA approval) to sell its assets to American Crystal. AR, Vol. 5, ACS-53.

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[5] "Tr." refers to the transcript of the proceedings held before the Administrative Law Judge. Citations to the transcript reference both page and line numbers of the transcript. For example, "51:1-18" refers to lines 1-18 of page 51 of the transcript and "204:16-205:18" refers to the transcript from line 16 of page 204 to line 18 of page 205.

C. The USDA Approved The Sale and Transferred Pacific's Allocation.

American Crystal outlined this proposed transaction and asked the USDA whether this sale would qualify to receive Pacific's allocation. AR, Vol. 5, ACS-53. Following meetings with the USDA, American Crystal restructured the transaction exactly as the government requested. Tr. Sept. 21, pp. 119:6-122:1; AR, Vol. 6, ACS-63. After receiving USDA approval, American Crystal paid $6.8 million to purchase all of Pacific's assets, including production rights, rights to the allocation, goodwill, personal property, intangible property, books, and records. Tr. Sept. 21, pp. 131:21-132:25, 137:5-140:1; AR, Vol. 6, ACS-72. The USDA also required American Crystal to purchase production assets formerly owned by Pacific, including processing equipment and rights to Pacific's factory and sugar silos. Tr. Sept. 21, pp. 133:2-134:21; AR, Vol. 6, ACS-72, Vol. 7, ACS-67.

Following this sale, in September 2003, the USDA transferred Pacific's allocation to American Crystal. AR, Vol. Supp. at 250-51; *see* Section 1359dd(b)(2)(F) (requiring transfer of the allocation upon sale of processor's assets). Amalgamated challenged the transfer, alleging that it was unlawful because Pacific had permanently terminated operations.

III. Procedural History

A. Amalgamated's Request for Reconsideration Was Denied by the USDA.

Amalgamated requested that the CCC reconsider the transfer of Pacific's allocation. After review, the Vice President of the CCC upheld the decision.

Amalgamated then filed a Petition for Review. An Administrative Law Judge reversed the CCC's determination. The ALJ found that Pacific was still a "processor" within the meaning of the Act at the time of the sale to American Crystal, but concluded that the transfer was not proper because Pacific had permanently terminated operations before the sale. Pet. App. 128, 140. American Crystal, the USDA, and Amalgamated all appealed to the USDA's Judicial Officer.

The Judicial Officer, the highest level of appeal within the USDA, reversed the ALJ, holding that the transfer was lawful because Pacific retained its allocation at the time of the sale and American Crystal had purchased all of Pacific's assets. Pet. App. 95 - 96.

B. The District Court Affirmed the Agency's Decision.

The jurisdiction of the District Court was invoked under 7 U.S.C. § 1359hh(d)(1) (as an action to enforce Part VII of Title III of the Act), 28 U.S.C. § 1331 (general federal question jurisdiction), and 28 U.S.C. § 1346(a)(2) (a civil action against the United States, founded on a Act of Congress and regulations of an executive department).

The District Court, relying on *Chevron* deference, entered summary judgment in favor of the USDA and American Crystal. The Court specifically found that the USDA's determination that Pacific was a processor was reasonable, given the use of the term "processor" throughout the relevant statutes. Pet. App. 64. The Court then concluded that the USDA reasonably interpreted the Act in transferring Pacific's allocation to American Crystal because American Crystal had purchased all of Pacific's assets. Pet. App. 67.

C. The Ninth Circuit Reversed the District Court.

The Ninth Circuit reversed, holding that the *Chevron* deference was misplaced, because the statute is not ambiguous. Pet. App. 16 - 17. The panel looked to dictionary definitions of the term "processor," rather than relying on the agency's expertise in interpreting Congressional intent in this highly regulated field. From these dictionaries, the Court concluded that a processor is one who is currently processing sugar. Thus, the Ninth Circuit held that Pacific was no longer a "processor." Pet. App. 22.

In addition, although the Act does not define "permanently terminated," the Court substituted its judgment for that of the USDA, concluding that Pacific had permanently terminated operations sometime before the sale to American Crystal in September 2003. Pet. App. 22. Therefore, the Ninth Circuit held that the USDA should have distributed Pacific's allocation to the entire industry pro rata, rather than transferring the allocation to

American Crystal.

In so holding, the Court ignored the statute allowing the USDA to temporarily reassign an allocation when a processor is unable to use it. The USDA temporarily reassigned Pacific's allocation in 2002 because Pacific was not producing sugar for that year. Instead of this temporary reassignment, contemplated by the Act, the panel held that Pacific should have been declared permanently terminated.

To reach this conclusion, the Ninth Circuit subjected the USDA to greater scrutiny by creating a new standard for determining whether an agency is entitled to deference when that agency has a purported self interest. The Ninth Circuit held that *Chevron* deference is inappropriate where "(1) the agency has a self-serving or pecuniary interest in advancing a particular interpretation of a statute, *and* (2) the construction advanced by the agency is arguably inconsistent with Congressional intent." (emphasis in original). Pet. App. 24.

Applying this new standard, the Court of Appeals noted that the USDA had conditioned approval of the transfer on American Crystal and Pacific's waiver of certain administrative and judicial rights of action against the USDA. Pet. App. 23. It also found that the USDA may have had a financial interest in approving the transfer, given that Pacific owed the USDA as much as $12.1 million after Pacific defaulted years before on a $20 million loan guaranteed by the USDA. Pet. App. 23. Although the USDA, in fact, received no financial benefit (and none of the parties had ever even argued this point), the Court of Appeals held that even "the existence of a *possible* pecuniary interest is of concern in evaluating the

manner in which the USDA administered the Act and interpreted its provisions." Pet. App. 24 (emphasis added).

In the end, the Ninth Circuit refused to grant *Chevron* deference to the USDA because it concluded that the USDA might have had a self-serving interest in interpreting the Act to allow the transfer of Pacific's allocation to American Crystal. Pet. App. 23 - 24.

The Ninth Circuit declined to rehear this case en banc.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari for three reasons. First, the Ninth Circuit overreached when it outlined a new standard for determining whether an agency is entitled to *Chevron* deference. This new test created a conflict with the D.C. Circuit. Second, the Ninth Circuit's decision is wrong on the facts and on the law. Third, the USDA acted reasonably in interpreting the Act and transferring this allocation.

IV. The Ninth Circuit Exceeded its Authority.

A. The Ninth Circuit's New Rule On Agency Self- Interest Substantially Undercuts *Chevron*.

The Ninth Circuit overreached by erecting a new rule which threatens to undercut *Chevron*. The Court held that *Chevron* deference may be inappropriate where "(1) the agency has a self-serving or pecuniary interest in advancing a particular interpretation of a statute, *and* (2) the construction advanced by the agency is arguably

inconsistent with Congressional intent." (Emphasis in original.) Pet App. 24. The Ninth Circuit's withdrawal of deference on the basis of alleged agency self interest significantly erodes this Court's decision in *Chevron*.

When reviewing an agency's interpretation, courts apply the two-part test established in *Chevron*. 467 U.S. at 842-44. A court must first determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If not, the court must defer to the agency's interpretation so long as it is "based on a permissible construction of the statute." *Id.*

1. The Alleged Self Interest Test Conflicts with *Chevron*.

The first part of the Ninth Circuit's rule is at odds with *Chevron* itself, which focuses on whether the agency's interpretation is a permissible construction of the statute, and not whether the agency has some sort of interest in the outcome. The Ninth Circuit's new standard is dangerously overbroad. Even the existence of a *possible* financial interest is of concern to the Court. Such a standard goes too far. Viewed from this perspective, an agency will almost always have a possible self interest.

2. The Alleged Self Interest was Never Argued in this Case.

Interestingly, the Ninth Circuit is the only level of review at which this alleged agency self interest was ever mentioned. This litigation has been ongoing for several years within the agency

and at the district court. None of the parties challenging the USDA's decision ever argued that the agency had a self serving interest of any kind. The Court of Appeals brought this concept up for the first time during oral argument. The Court then issued an initial decision setting forth its concerns about this alleged agency self interest. Later, the Court issued an amended decision, containing a revised version of its standard relating to *Chevron* deference and agency self interest. Pet. App. 2 - 3.

3. There Was No Agency Self Interest.

The alleged self interest found by the Ninth Circuit was a weak foundation on which to create this new rule. In fact, there was no financial motivation for the USDA to approve the asset sale. While Pacific had defaulted on its loans years before, the USDA neither sought nor received any financial benefit in approving the sale to American Crystal. Pacific's creditors were partially repaid from the proceeds of the sale to American Crystal, but the USDA was not. The agency approved this transaction, knowing full well that it would not receive any financial benefit.

4. A Court Should Not Overturn Agency Interpretations That Are Arguably Consistent With Congressional Intent.

The most troubling aspect of the Ninth Circuit's rule is the second part, which requires only that the interpretation advanced by the agency be "arguably inconsistent" with Congressional intent.

But if something is arguably inconsistent, then it is also arguably consistent with Congressional intent. Regardless of an agency's theoretical self interest, if its interpretation is arguably *consistent* with Congressional intent, how can a court justify substituting the court's interpretation for the agency's? Yet that is the rule adopted by the Ninth Circuit.

Chevron requires much more than arguable inconsistency before deference to an agency decision is withdrawn. *Chevron* requires only that the agency's interpretation be reasonable. A reviewing court need not find that the agency's interpretation is the only permissible construction of the statue, or even the interpretation the court would have reached, but only that the agency's interpretation is not arbitrary and capricious. *Chevron*, 467 U.S. at 843, n. 11.

But the Ninth Circuit's rule would allow a court to substitute its own interpretation merely by finding that the agency's interpretation is arguably inconsistent with Congressional intent. This is contrary to the long standing rule that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 844.

B. The Ninth Circuit's Rule Conflicts With the D.C. Circuit.

Contrary to the Ninth Circuit, the Court of Appeals for the District of Columbia recognizes that "self-interest alone gives rise to no automatic rebuttal of deference. Indeed, given the ubiquity

of some form of agency self-interest, . . . a general withdrawal of deference on the basis of agency self-interest might come close to overruling *Chevron*, a decision far beyond our authority." *Indep. Petroleum Ass'n of America v. DeWitt*, 279 F.3d 1036, 1040 (D.C. Cir. 2002).

The Ninth Circuit acknowledged *DeWitt* in passing, but relied instead on an earlier case of the D.C. Circuit, *National Fuel Gas Supply Corp. v. FERC*, 811 F.3d 1563, 1571 (D.C. Cir. 1987), for the proposition that an agency's self interested re-interpretation of a contract might not be entitled to *Chevron* deference. *National Fuel*, however, does not hold that deference is inappropriate whenever an agency might have a self interest and its interpretation is arguably inconsistent with Congressional intent. The Ninth's Circuit's reliance on *National Fuel* is misplaced.

The mere fact that an agency decision might conceivably implicate its own interests should not warrant denial of *Chevron* deference. The D.C. Circuit does not recognize such an automatic withdrawal of deference because it understands the obvious danger of such a far-reaching standard – that it will erode, if not overrule, this Court's decision in *Chevron*. *DeWitt*, 279 F.3d at 1040. And that is exactly the effect of the Ninth Circuit's rule. Even a possible financial interest may warrant the denial of *Chevron* deference under the Ninth Circuit's new standard.

Indeed, the Ninth Circuit's "arguably inconsistent" test essentially renders *Chevron* meaningless because it allows a court to impose its own interpretation of a statute. If these agency deci-

sions were not "arguable," there would never need to be an interpretation. That is the whole point of *Chevron*.

The Ninth Circuit's rule conflicts with the D.C. Circuit and with 25 years of cases following *Chevron*. This Court's intervention is necessary to resolve this conflict and provide guidance on the relationship between *Chevron* deference, agency self interest, and the role of a reviewing court in substituting its judgment for that of the agency.

V. The Ninth Circuit's Decision is Wrong.

This Court should also grant certiorari because the Ninth Circuit's holding is simply wrong. The Court's concern over the USDA's purported self interest infected its entire analysis. The Court ignored a crucial provision of the Act – the USDA's discretion to temporarily reassign a processor's allocation – so that it could justify its conclusion that the terms "processor" and "permanently terminated operations" are unambiguous. This is a result-driven opinion that cannot withstand scrutiny.

A. The Ninth Circuit Erred in Finding the Term "Processor" to be Unambiguous.

The Court erroneously concluded that the term "processor" is unambiguous. Since 2004, this case has been litigated at four different levels before reaching the Ninth Circuit. The definition of "processor" has been a key issue at each stage, but none of the prior decisions adopted the definition that the Ninth Circuit did. All the earlier decisions found that Pacific was a processor. Not even the ALJ – who

ruled against the USDA – interpreted "processor" this way. In fact, unlike the Ninth Circuit, the ALJ concluded that Pacific was still a processor.

1. The Ninth Circuit's Definition Does Not Fit The Statute's Use of "Processor."

The Court of Appeals acknowledged that the Act does not define "processor." Pet. App. 18. It looked to three dictionaries to determine the "plain and ordinary" meaning to be "an entity who processes sugar." Pet. App. 18 – 19. The Court concluded that "processor" was not ambiguous because the Act consistently uses it to refer to entities who process sugar. *Id.* This conclusion is simply incorrect. While defining "processor" as "one who processes," certainly has a superficial appeal, this definition does not fit the different ways the statute uses the term.

The primary flaw in the Ninth Circuit's reasoning is that "processor" is used in different ways throughout the statute and regulations. Its use is not internally consistent within the statute, nor is it consistent with the Ninth Circuit's conclusion.

It is a "basic canon of statutory construction that identical terms within an Act bear the same meaning." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992). If a "processor" must actually be processing sugar, then any business that has a temporary disruption in its facility or crop supply, cannot be a "processor." This is contrary to the statutory language allowing a temporary reallocation when a processor is unable to produce sugar in a given year. Section 1359ee(b)(2). "[T]he fact that the provision can support two plausible interpretations

renders it ambiguous for purposes of *Chevron* analysis." *AFL-CIO v. FEC*, 333 F.3d 168, 174 (D.C. Cir. 2003).

2. The Ninth Circuit's Definition Does Not Take Into Account Processors Which Are Not Currently Processing Sugar.

This Court has made clear that "[i]n making the threshold determination under *Chevron*, 'a reviewing court should not confine itself to examining a particular statutory provision in isolation' . . . [r]ather 'the meaning – or ambiguity – of certain words or phrases may only become evident when placed in context.'" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000)). When the Ninth Circuit's definition of "processor" is applied throughout the relevant sections of the Act, it renders other sections of the Act inconsistent and meaningless.

Under the Court's definition, once a company has been dissolved, disposed of its assets, or permanently ceases operations, it cannot be a "processor." But Congress specifically refers to dissolved, liquidated, and permanently terminated entities as "processors." Section 1359dd(b)(2)(E). It also refers to entities that have sold their assets as "processors." Section 1359dd(b)(2)(F).

3. The Ninth Circuit's Definition Conflicts With All The Previous Definitions of "Processor" In This Case.

The Ninth Circuit's interpretation is also not practical under the Act. Indeed, the Vice President of the CCC, the ALJ, the Judicial Officer, and the District Court all found that one can remain a processor even if not currently processing sugar. As the ALJ recognized, "a failing processor needs time to wind down operations before selling its company or all of its assets" and even though Pacific no longer had "either a viable processing facility or a supply of current beets, it was still entitled to be treated as a 'processor' for the purposes of administering [Section 1359dd(b)(2)(F).]" Pet. App. 128.

The Vice President of the CCC, the ALJ, the USDA's Judicial Officer, and the District Court all disagreed with the Ninth Circuit's use of the term "processor." In the face of these previous decisions, can one simply look to a dictionary and conclude that there was no ambiguity in the use of this term? Instead of glossing over the ambiguity, the Court should have deferred to the agency's interpretation. As *Chevron* recognized, the agencies, rather than the Courts, have the experience and expertise necessary to interpret congressional intent and administer these regulatory programs.

B. The USDA's Interpretation of "Processor" is Reasonable.

Pacific earned its initial allocation by its sugar production in 1998-2000. *See* Section

1359dd(b)(2)(A). No one, including Amalgamated, objected to Pacific's initial allocation or its status as a processor when the Act took effect in October 2002, or when the USDA temporarily reassigned Pacific's allocation. Tr. Sept. 21, pp. 56:13-57:5; Tr. Oct. 4, pp. 211:1-212:5.

The District Court correctly found that the USDA's definition of "processor," as an entity with a market allocation is reasonable, given the use of the word throughout the statute. Pet. App. 64. Indeed, Congress refers to "processors" throughout the Act as entities with market allocations. As the District Court pointed out, this contrasts with "new entrants" which are not "processors" because they do not yet have allocations. Pet. App. 64; *see* 7 U.S.C. § 1359dd(b)(2)(G), (H) (2006). The Court also found the USDA's interpretation was reasonable because a temporary reassignment could only be made from a processor with an allocation, which is unable to market that allocation. Pet. App. 65.

The Court of Appeals, however, found that the USDA's interpretation was not reasonable because it conflicts with the regulation providing that "processor means a person who commercially produces sugar, . . . has a viable processing facility, and a supply of sugar beets for the applicable allotment year." 7 C.F.R. § 1435.2; *see* Pet. App. 21.

But the Ninth Circuit's interpretation quickly unravels upon closer scrutiny. If an entity can only be a processor if it is producing sugar and has a supply of beets, then what purpose could the temporary reassignments in Section 1359ee(b)(2) serve? Congress specifically gave the USDA discretion in Section 1359ee(b)(2) to deal with processors who are unable

to produce sugar in a particular year. Under the Ninth Circuit's definition, however, these entities can no longer even be considered processors and § 1359 ee(b)(2) is rendered meaningless.

If a statute can reasonably be construed in more than one way, the Court "may not substitute its own construction" for a reasonable interpretation by the USDA – the agency that Congress entrusted to implement the legislation. *Chevron*, 467 U.S. at 844.

C. The Ninth Circuit Erroneously Found that the Phrase "Permanently Terminated Operations" is Unambiguous.

The Court of Appeals incorrectly concluded that the phrase "permanently terminated operations" is unambiguous. The court did not attempt to explain when a temporary shut-down of operations should be viewed as a permanent termination.

If a processor permanently terminates operations, the USDA is required to distribute the allocation pro rata to the entire industry. Section 1359dd(b)(2)(E). The Ninth Circuit concluded that Pacific had permanently terminated at some point before the sale of its assets to American Crystal. Pet. App. 22. Thus, the sale should not have gone through because Pacific's allocation should already have been distributed to the rest of the industry. The Court again failed to understand the ambiguity in the phrase "permanently terminated."

The Act never defines *what* permanent termination is, much less *when* it occurs. For example, how long must a processor's financial hardship continue before it is deemed to have "permanently ter-

minated operations"? How many assets does a processor have to sell before it has permanently terminated operations?

The ambiguity becomes evident upon examining the interplay between the USDA's discretion to temporarily reassign an allocation (when a processor is unable to produce sugar for a particular year), with the requirement to eliminate an allocation when a processor permanently terminates. Because Congress did not provide guidelines as to when a temporary cessation becomes permanent, the USDA is charged with the difficult task of determining when to pull the plug on a struggling processor. Despite the lack of statutory clarity on this issue, the Ninth Circuit simply presumed that "permanently terminated operations" is unambiguous.

D. The USDA Reasonably Found that Pacific Had Not Permanently Terminated Operations.

When reviewing an agency action to determine whether it is arbitrary and capricious, the scope of review "is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Ninth Circuit did not adhere to this standard.

In 2002, the first year of the amended Act, the USDA granted Pacific the allocation it had earned by producing sugar between 1998-2000. But the USDA recognized Pacific's inability to produce sugar for the upcoming year and used its discretion to temporarily reassign the allocation. This was rea-

sonable because, while Pacific was obviously struggling, it was still attempting to resume operations.

From 2001 through 2003, the majority of the sugar industry (including Amalgamated) considered some type of joint undertaking with Pacific. Pacific also met and/or negotiated with many other companies in search of operating capital or a partnership that would allow it to resume operations. The record reflects that Pacific met with Global Ventures, General Mills, Cargill, American Federal Securities, Aegon Insurance, Oxbow Financial, Selby Financial, British Sugar, and many other companies. Tr. Sept. 23, pp. 15:2-18:2, 90:13-101:8; Tr. Sept. 22; pp. 90:2-102:16. Despite Pacific's financial condition, it had not given up hope. Pacific even petitioned the USDA to increase its allocation during 2002-03. AR, Vol. 5, ACS-23. Why would a company that was "permanently terminated" ask for an increase in its allocation if it had no interest in processing sugar again?

Because the USDA's approach was reasonable and consistent with the Act, "*Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). The Ninth Circuit failed to recognize this fundamental principle of *Chevron*.

E. American Crystal Purchased All of Pacific's Assets.

The Ninth Circuit also erroneously held that the phrase "all of the assets" is unambiguous.

This is yet another example of the Court's effort to avoid giving deference to the USDA.

To satisfy the requirements for an allocation transfer, American Crystal must have purchased all of Pacific's assets. *See* Section 1359dd(b)(2)(F). The Act is silent as to whether the sale must include assets that Pacific had at the time or those assets that it may have owned in the past. Nor does the Act specify what constitutes a material asset. The Ninth Circuit simply presumed that the phrase "all of the assets" is unambiguous.

On September 8, 2003, American Crystal paid over $3 million for all of Pacific's assets, including sugar production rights, interest in the allocation, goodwill, personal property, intangible property, books, and records. Tr. Sept. 21, pp. 131:21-132:25, 138:21-23; AR, Vol. 6, ACS-72. American Crystal bought not only all of Pacific's current assets, but also assets formerly owned by Pacific that had been used to process sugar. American Crystal paid over $2 million for leases and sugar production equipment formerly owned by Pacific, including: a lime kiln, a molasses desugarization system, vacuum intermediate pans, crystallizers, pumps, tanks, scales and slicers. Tr. Sept. 21, pp. 138:17-139:1; AR, Vol. 6, ACS-72, Vol. 7, ACS-67. American Crystal also obtained control of the sugar silos and the factory via a lease and option to purchase. AR, Vol. 7, ACS-67. Because American Crystal purchased all of Pacific's assets, the USDA reasonably interpreted the Act to require the transfer of Pacific's allocation to American Crystal.

The Ninth Circuit, however, substituted its own interpretation and found that the absence of

some material assets confirmed that Pacific had permanently terminated operations prior to the sale. Pet. App. 27. But Pacific did not permanently terminate until it sold all its remaining assets to American Crystal. *See* Sections 1359dd(b)(2)(E)-(F). The Court should have deferred to the USDA because the USDA's conclusion was based on a permissible construction of the statute. *See Chevron*, 467 U.S. at 843. Indeed, "the question . . . [was] not whether . . . [the agency's conclusion] represents the best interpretation of the statute, but whether it represents a reasonable one." *Smiley v. Citibank*, 517 U.S. 735, 744-45 (1996). As the Ninth Circuit acknowledged, "if Pacific's only remaining assets were good will, production rights, production history, books, and records, it would not be unreasonable to conclude that American Crystal purchased *all* of Pacific's assets." (Emphasis in original). Pet. App. 27.

This Court should intervene to correct the Ninth Circuit's opinion so that it is consistent with *Chevron*.

VI. The USDA's Decision to Transfer Pacific's Allocation was a Reasonable Interpretation of the Act.

Nothing in the Act requires the agency to take action within a specific timeframe to declare *when* a processor has permanently terminated its operations.

A. The USDA Successfully Managed Pacific's Situation As The Statute Envisioned.

The first crop year under the Act began in October 2002. It was less than one year later – and before the Act's second crop year even began – that American Crystal bought all of Pacific's assets. Given all the efforts by Pacific to resume operations during this time (which were hardly consistent with a decision to permanently terminate), less than one year is a very reasonable timeframe.

The USDA's interpretation successfully resolved the situation the industry faced in 2002-03. With Pacific in financial trouble, the USDA temporarily reallocated Pacific's 2002 allocation, while waiting to see how events would play out.

Although no one disputed Pacific's right to receive an initial allocation, it was also undisputed that Pacific was in serious financial trouble. The Ninth Circuit held that the USDA should, at some point, have declared Pacific to be permanently terminated and divided its allocation among the other processors. Instead the USDA monitored the situation during the 2002 crop year, responded to requests from the industry about ways to acquire Pacific, and ultimately transferred Pacific's allocation when American Crystal purchased its assets in September, 2003.

By finding that the USDA should have declared Pacific to have been permanently terminated, the Court is trying to apply an objective standard – years after the fact – to a subjective series of events. This is a classic case of Monday morning quarterbacking. The USDA had to evaluate the industry

conditions at the time and exercise its discretion in light of the statutory language and purposes. The USDA appropriately did so. Its actions are consistent with the purpose of the statute.

Rather than rush to judgment, the USDA temporarily assigned the allocation to other processors who could meet the market need, while watching to see whether Pacific would survive, fail or become acquired by another processor. The USDA did not delay unduly; all these events took place in less than one crop year. Before the end of that year, American Crystal bought all of Pacific's assets and the allocation was transferred.

B. The USDA's Actions Benefited Pacific's Growers And Creditors.

The implication of the Ninth Circuit decision is that Pacific's allocation should have been redistributed pro rata to the entire industry, without any processor having to pay anything. Thus, no funds would have been generated to pay Pacific's growers and creditors. Other processors would have, literally, received something for nothing. The USDA's decision, on the other hand, allowed for an orderly winding up of Pacific's business. Nearly $7 million was paid by American Crystal, most of which benefited Pacific's growers and its creditors.

The Act allows the industry to rationalize itself economically under the close supervision of knowledgeable and experienced government regulators. In this case, Pacific was able to negotiate with the entire industry in a way that allowed its assets to be sold and its allocation to be transferred in a fair and open process.

C. The Ninth Circuit's Decision Would Bring Uncertainty To Any Regulated Industry.

The Act, as interpreted here by the USDA, has brought certainty and predictability to the industry. If upheld, the Court of Appeals' decision would throw the industry into chaos. Why would a company seek to purchase a processor's assets when the transaction might be overturned years later, thus undermining all of the plans and investments made in reliance on government approval of the transaction? If a processor cannot rely on the approval of the government regulator, there is obviously no predictability and certainty in the industry.

The law provides that processors are supposed to be able to purchase the assets of other processors, sell factories to another processor, and conduct similar transactions. 7 U.S.C. § 1359dd. None of these transactions would ever take place if the buying and selling processors are unable to rely on the USDA's approval of the transaction. A processor would be forced to get agency, ALJ, Judicial Officer, District Court, and Appellate Court approval before proceeding with a transaction. This cannot be Congress' intent.

Moreover, by overturning the USDA's reasonable interpretation of the Act, this decision threatens to bring uncertainty and increased litigation challenging agency decisions. The sugar industry benefits from being able to rely on the USDA's decisions—just as the country as a whole benefits from being able to rely on agency decisions. The decision of the Ninth Circuit makes such reliance significantly riskier.

By substituting its own interpretation of an ambiguous statute for that of the agency, the Ninth Circuit's decision injects new uncertainty into the question of whether an agency decision will ultimately be upheld upon judicial challenge. This provides new incentive for private parties to challenge a host of agency decisions previously thought worthy of *Chevron* deference. If private parties cannot rely on the decisions of the government regulator, there is no predictability and certainty in any regulated industry.

CONCLUSION

For the reasons stated above, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

David P. Bunde
Counsel of Record
Emily E. Duke
Sarah C.S. McLaren
Timothy M. O'Shea
FREDRIKSON & BYRON, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, Minnesota 55402-1425
(612) 492-7000

Counsel for Petitioner

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMALGAMATED SUGAR CO. LLC,
Plaintiff-Appellant,

v.

THOMAS VILSACK;* DEPT. OF AGRICULTURE,
Defendants-Appellees.

AMERICAN CRYSTAL SUGAR COMPANY,
Intervenor-Appellee.

No. 07-35971

D.C. No.
CV-06-00167-EJL

ORDER AND
AMENDED
OPINION

Appeal from the United States District Court
for the District of Idaho

Edward J. Lodge, District Judge, Presiding

Argued and Submitted
September 15, 2008—Moscow, Idaho

Filed February 11, 2009
Amended April 6, 2009

Before: J. Clifford Wallace, Stephen S. Trott and
N. Randy Smith, Circuit Judges.

Opinion by Judge N. R. Smith

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* Thomas Vilsack is substituted for his predecessor, Mike Johanns, as United States Secretary of Agriculture, pursuant to Fed. R. App. P. 43(c)(2).

COUNSEL

Kevin J. Brosch, DTB Associates, LLP, Washington, District of Columbia, for the plaintiff-appellant.

Jeffrey Kahn, Office of the General Counsel, U.S. Dept. of Agriculture, Washington, District of Columbia; Joanne P. Rodriguez, Assistant United States Attorney, United States Attorney's Office, Boise, Idaho, for the defendant-appellee.

David P. Bundle and Sarah C.S. McLaren, Fredrikson & Byron, PA, Minneapolis, Minnesota, for the intervenor-appellee.

ORDER

The opinion in the above-captioned matter filed on February 11, 2009, and published at 555 F.3d 816 (9th Cir. 2009), is amended as follows:

1. On slip Opinion page 1631, line 3, replace "to be" with "are".

2. On slip Opinion page 1632, lines 20-21, replace "Section 1359cc" with "§ 1359cc".

3. On slip Opinion page 1648, lines 13-23, delete in their entirety the two sentences that state:

> Where an agency interprets or administers a statute in a way that furthers its own administrative or financial interests, the agency interpretation must be subject to greater scrutiny. *Chevron* deference is also inappropriate where an agency has a self-serving, pecuniary interest in advancing a particular interpretation of a statute. *Cf. Nat'l Fuel Gas Supply v. Fed. Energy Reg. Comm'n*, 811 F.2d 1563, 1571 (D.C. Cir. 1987) (noting that while an agency's

interpretation of a statute incorporated into a contract may be entitled to deference, such deference may be inappropriate where the agency itself is a party to the contract).

4. On slip Opinion page 1648, line 14, insert a new paragraph after the sentence ending "... Congressional intent." The new paragraph shall read as follows:

> Where an agency interprets or administers a statute in a way that furthers its own administrative or financial interests, the agency interpretation must be subject to greater scrutiny to ensure that it is consistent with Congressional intent and the underlying purpose of the statute. We acknowledge that "self-interest alone gives rise to no automatic rebuttal of deference." *See Independent Petroleum Ass'n of America v. DeWitt*, 279 F.3d 1036, 1040 (D.C. Cir. 2002). However, *Chevron* deference may be inappropriate where, as here, (1) the agency has a self-serving or pecuniary interest in advancing a particular interpretation of a statute, *and* (2) the construction advanced by the agency is arguably inconsistent with Congressional intent. *See Nat'l Fuel Gas Supply v. Fed. Energy Reg. Comm'n*, 811 F.2d 1563, 1571 (D.C. Cir. 1987) (noting that while an agency's interpretation of a statute incorporated into a contract may be entitled to deference, such deference may be inappropriate where the agency itself is a party to the contract); *Chevron*, 467 U.S. at 843 n. 9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

Having made the foregoing amendments to the opinion, the panel has unanimously voted to deny Appellee's Petition for Panel Rehearing, and so that petition is DENIED. No further petitions for rehearing or rehearing en banc will be accepted.

OPINION

N.R. SMITH, Circuit Judge:

We are asked for the first time to review the construction and application of certain provisions of the Agricultural Adjustment Act (the "Act"), specifically 7 U.S.C. §§ 1359dd(b)(2)(E)-(F).[1] We conclude that the disputed provisions of the Act are unambiguous; therefore, the district court erred in granting *Chevron* deference to the interpretation advanced by the U.S. Department of Agriculture (the "USDA"). Within the Act, we hold that a "processor" is an entity who processes sugar, as defined by the USDA's own regulations and entirely within the natural and ordinary meaning of the word. The Act requires the USDA to eliminate a processor's sugar marketing allocation ("allocation") when the processor has "permanently terminated operations (other than in conjunction with a sale or other disposition of the processor or the assets of the processor)." § 1359dd(b)(2)(E). We hold that Pacific Northwest Sugar Company ("Pacific") permanently terminated operations prior to and not in conjunction with the purported sale of assets to Defendant-Intervenor American Crystal Sugar Company

[1] All statutory references herein are to title 7, United States Code, unless otherwise noted, and therefore omit "7 U.S.C." from the citation.

("American Crystal"). Therefore, we conclude that the USDA erred in approving the transfer of the allocation to American Crystal, and Pacific's sugar marketing allocation must be redistributed pro rata among all processors. § 1359dd(b)(2)(E). We reverse the district court's summary judgment in favor of the USDA and American Crystal.

I. Factual and Procedural History

Pacific processed sugar beets during the 1998, 1999, and 2000 crop years at its only factory in Moses Lake, Washington. Facing substantial financial problems, Pacific wrote to one of its creditors in January 2001, describing its financial problems, stating that Pacific could not continue to operate in the coming years, and proposing liquidation of the company. Pacific stopped processing sugar at Moses Lake in February 2001, had no sugar beet crops in 2002 or 2003, and never resumed operations. In June 2001, Pacific sold the Moses Lake facility to Central Leasing for $2.1 million and leased the plant back with a twelve-month option to repurchase the facility.[2] Also in June 2001, Pacific unsuccessfully attempted to secure capital to continue as a sugar beet processor. On July 23, 2001, Pacific was administratively dissolved by the Secretary of State of the State of Washington for failure to file an annual license renewal application, as required by Washington State law. Also in 2001, Pacific terminated the majority of its employees, and by April 2002, Pacific employed no one at its only factory. In March 2002, Pacific's lease of the Moses Lake facility from Central Leasing ended when

[2] Although Central Leasing acquired Pacific's plant and equipment, it never sought to acquire Pacific's sugar allocation.

Pacific failed to pay the agreed rent, and the lease was not renewed.

On May 13, 2002, Congress amended the Act,[3] creating the Flexible Marketing Allotments for Sugar ("FMAS") program. The purpose of the program was to stabilize sugar prices by requiring the Secretary of Agriculture (the "Secretary") to determine the total amount of domestically produced sugar that can be marketed in the United States for the coming year (the "allotment") and then assign allocations for production of sugar to processing companies in the United States. § 1359cc.[4] By rule, the program is administered by the CCC, an agency of the USDA. 7 C.F.R. § 1435.1. Under the program, Congress directed the Secretary to make initial allocations based upon historical beet sugar production levels for the 1998 through 2000 crop years.

In June 2002, Central Leasing began disposing of the equipment formerly owned by Pacific. By July 2002, Pacific owned no sugar beet processing equipment, and its option to repurchase the Moses Lake facility had expired. Also in July 2002, Pacific's Board of Directors indicated that it would no longer expend money for financial or legal consulting. The Board also announced that Washington Sugar Company, LLC ("Washington Sugar") would succeed

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[3] *See* Farm Security and Rural Investment Act of 2002, Pub. L. No. 107- 171, 116 Stat. 134, 187-204 (May 13, 2002).

[4] The overall marketing allocation is divided between sugar derived from sugar beets and sugar derived from sugarcane. § 1359cc(c). This case involves sugar beet sugar allocations. Sugar beet processors who knowingly market sugar or sugar products in excess of their allocation are liable to the Commodity Credit Corporation (the "CCC") for a civil penalty equal to three times the U.S. market value of the sugar involved in the violation. 7 C.F.R. § 1435.318(a).

Pacific and assume any debts or obligations relating to reviving processing operations at Moses Lake. On September 24 and October 3, 2002, Scott Lybbert, as President of Washington Sugar,[5] wrote to the CCC to request that Pacific's allocation be transferred to Washington Sugar. The CCC responded on October 11, 2002 that, as a "new entrant," the allocation would be transferred "upon receipt of a copy of the bill of sale showing that virtually all of the assets of Pacific Northwest, including the factory, have been acquired by the Washington Sugar Company."[6] During this same period, appellant, Amalgamated Sugar Company, LLC ("Amalgamated"), and others also inquired of the CCC about acquiring Pacific's allocation.

On October 1, 2002, the CCC made the initial beet sugar marketing allocations for crop year 2002. Pacific received an allocation of 2.692 percent of the allotment, based on its production history for the 1998-2000 crop years.[7] However, the USDA immediately reassigned virtually all the allocation, because Pacific was not processing sugar and was unable to market its share.

In a December 2002 USDA audit, the USDA Inspector General reported that because of financial difficulties, Pacific defaulted on a $20 million USDA

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[5] The USDA never transferred the allocation to Washington Sugar, we assume because Washington Sugar could not provide a bill of sale showing that it had purchased virtually all of Pacific's assets.

[6] Lybbert was a former Vice-President of Pacific and a member of Columbia River Sugar Company ("CRSC"), as well as the sole owner of Washington Sugar.

[7] The USDA apparently interpreted the Act to require them to make an allocation to Pacific, despite the fact that Pacific was no longer processing sugar.

guaranteed loan, which resulted in a loss of $12.1 million to the USDA's Rural Development Agency. The USDA audit stated that in May 2001, "[t]he plant closed and the lender was forced to liquidate the company's assets."

On December 3, 2002, the CRSC[8] adopted a resolution purporting to transfer its allocation to Washington Sugar, in support of Washington Sugar's efforts to revive operations at Moses Lake. The resolution stated, "CRSC has no desire, interest or ability to move forward and operate [the Pacific] processing facility."

After purporting to convey its interest in the allocation to Washington Sugar and despite the fact that Pacific never used any of its 2002 allocation, representatives of Pacific sought to have the allocation increased for crop year 2003. After a hearing on June 16, 2003, the CCC denied Pacific's request. During the hearing, several processors (including American Crystal) testified that Pacific had been dissolved or seemingly terminated operations and was unlikely to resume operations.[9]

In July 2003, American Crystal began negotiating with Lybbert (on behalf of Washington Sugar) and Central Leasing to purchase the assets previously owned by Pacific, in an effort to secure the transfer of Pacific's allocation by the CCC. On July 3, 2003, American Crystal wrote to the CCC, discussing

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[8] CRSC is the sugar beet growers' association that wholly owned Pacific.

[9] For example, the President and CEO of Defendant-Intervenor American Crystal, wrote: "Pacific Northwest has not processed sugarbeets of the 2001 and 2002 crops, and it is our understanding that no sugarbeets have been planted for the 2003 crop. Therefore, it is a real question as to whether it will be able to continue operation in 2003. . . ."

the proposed acquisition:

> American Crystal[ ] is currently contemplating a transaction, which would effectively result in the allocation, currently owned by [Pacific], being transferred to [American Crystal]. As currently contemplated, substantially all of the assets of [Pacific] would be transferred to an intermediary company, [Washington Sugar]. Since [Pacific] has already transferred ownership of its former processing facility to another party (Central Leasing, LLC), *substantially all of the assets of [Pacific] consists* [sic] *mainly of the marketing allocation and some other generally immaterial assets.* The next step in the transaction would be the immediate transfer of substantially all of the assets of [Washington Sugar] to [American Crystal] . . . The effect of the transaction would be to move the sugar marketing allocation from [Pacific], through [Washington Sugar], to [American Crystal].

(emphasis added).

On July 30, 2003, American Crystal informed the CCC of American Crystal's intent to "acquire ownership or control of the assets (including the rights to the production history and the marketing allocations), associated with the Moses Lake, Washington sugarbeet processing factory." In the same letter to the CCC, American Crystal sought the CCC's preliminary approval and informed the CCC that American Crystal had no intention of ever operating the Moses Lake facility.

On August 28, 2003, the CCC replied: "We

understand that American Crystal is purchasing all of the assets of Pacific Northwest, securing the rights to make sugar at the Pacific Northwest/Central Leasing factory site, and purchasing some of the sugar making equipment used by Pacific Northwest." The CCC also stated that it would condition approval of the transfer on: (1) receiving documentation of the purchase of Pacific's assets by American Crystal; (2) certification from Pacific that it had not marketed any sugar under the 2002 allocation; (3) waiver by American Crystal and Pacific of rights to bring any action against the USDA in the event that the USDA is required by a court to reverse the transfer of the allocation; and (4) agreement by American Crystal to drop Pacific's appeal of the CCC's June 16, 2003 adverse ruling regarding Pacific's request to increase its allocation for 2003.

On September 8, 2003, Pacific was reinstated as a legal corporation when it filed the necessary documents with the State of Washington. That same day, Washington Sugar also executed a cancellation agreement with Pacific, revoking the previous transfer of Pacific's allocation to Washington Sugar. These agreements were executed in conjunction with Pacific's purported conveyance of its allocation to American Crystal. That same day, American Crystal advised the CCC that it had acquired, through its wholly owned subsidiary Crab Creek Sugar Company "ownership or control of all of the assets (including the rights to the production history and the marketing allocations) associated with the production of sugar at the Moses Lake, Washington sugarbeet processing factory." American Crystal paid $6.8 million to acquire the allocation, including $2.125 million to Central Leasing, $300,000 to Lybbert (in consideration of a non-compete agreement), and

$3.025 million to Pacific. On September 16, 2003, the CCC wrote to Lybbert to inform him that Pacific's allocation would immediately be transferred to American Crystal.

On December 4, 2003, Amalgamated filed a Petition for Review, administratively challenging the CCC's transfer decision. On February 7, 2005, the USDA's Administrative Law Judge ("ALJ") issued a decision ("Initial Decision") reversing the CCC's determination, finding that the transfer was not proper because Pacific had permanently terminated operations.

On February 28, 2005, the CCC appealed the decision to the USDA Judicial Officer ("JO"). The JO reversed the Initial Decision without a hearing and affirmed the CCC's determination. The JO construed the Act to mean that as long as the CCC had not eliminated and redistributed a processor's allocation, that allocation may be sold along with the processor's assets. Amalgamated subsequently appealed to the district court, seeking judicial review of the JO's decision. On cross-motions for summary judgment, the district court deferred to the USDA's construction of the Act and entered summary judgment in favor of the USDA and American Crystal. Amalagamated now appeals.

We are asked to decide whether the JO's interpretation of the Act was reasonable, supported by the administrative record, in accordance with the law, not arbitrary or capricious, and therefore entitled to deference under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

II. Standard of Review

We review de novo the district court's decision

on cross-motions for summary judgment. *Arakaki v. Hawaii*, 314 F.3d 1091, 1094 (9th Cir. 2002). We are governed by the same standard used by the trial court and must determine whether the district court correctly applied the relevant substantive law. *See McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008). The USDA's "interpretation or application of a statute is a question of law reviewed de novo." *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 765 (9th Cir. 2007).

The Administrative Procedure Act governs our review of agency action, and consequently, we must determine whether the USDA's decision was arbitrary, capricious, an abuse of discretion, or not in accordance with law. 5 U.S.C. § 706; *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 638 (9th Cir. 2004). Our review is "searching and careful, but the arbitrary and capricious standard is narrow, and we cannot substitute our own judgment for that of the [Agency]." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 858 (9th Cir. 2005) (internal quotation marks omitted).

III. The Act Guarantees an Equitable Opportunity to Market Sugar to All Processors

We begin by noting that the Act works to maintain sugar prices by limiting the total amount of sugar that can be produced and marketed, allocating the total sugar allotment for a given crop year among all sugar processors in a fair and equitable manner. *See* § 1359bb. The Act makes clear that its purpose is to "afford all interested persons an equitable opportunity to market sugar under an allotment" and that "the Secretary shall allocate each such allotment among the processors covered by the allotment." § 1359dd(a). Because the Act places significant

restrictions on the freedom of processors to produce and market sugar, the Act's overarching directive is to ensure predictable, fair, and transparent allocation of the allotments to reflect industry events and changes in industry conditions. *See* 148 Cong. Rec. S513, S514 (Feb. 8, 2002) (statement of Sen. Conrad) ("The purpose of this amendment is to provide a predictable, transparent, and equitable formula for the Department of Agriculture to use in establishing beet sugar marketing allotments in the future. . . . [T]he formula allows for adjustments in the reallocation of beet sugar allotments to account for such industry events as the permanent termination of operations by a processor, the sale of a processor's assets to another processor, the entry of new processors, and so on. Taken together, these provisions offer the predictability, fairness, and transparency we all agree is much needed in the sugar beet industry.").

A. Permanent Termination of Operations Triggers the Requirement that an Allocation be Redistributed or Transferred.

In construing the provisions of the Act, we first look to the language of the statute to determine whether it has a plain meaning. *McDonald v. Sun Oil Co.*, 548 F.3d 774, 780 (9th Cir. 2008). "The preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there. Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *Id.* (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (internal quotations omitted)). Here, we conclude that the

statutory text is unambiguous.

[1] To maintain an equitable allocation among processors under the FMAS program, Congress directed the USDA to eliminate the allocation of a processor that permanently terminates operations and redistribute it equitably among *all* processors. Section 1359dd(b)(2)(E) provides:

> If a processor of beet sugar has been dissolved, liquidated in a bankruptcy proceeding, or otherwise has permanently terminated operations (other than in conjunction with a sale or other disposition of the processor or the assets of the processor), the Secretary ***shall*** —
>
> (i) eliminate the allocation of the processor provided under this section; and
>
> (ii) distribute the allocation to other beet sugar processors on a pro rata basis.

§ 1359dd(2)(E) (emphasis added).[10]

A single processor may receive and exclusively benefit from the allocation of another processor by

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[10] The related USDA regulation in effect in 2003 provides: that the "CCC will eliminate the allocation of the processor who has been dissolved or liquidated in a bankruptcy proceeding and the allocation will be distributed to all other processors on a pro-rata basis." 7 C.F.R. § 1435.308(b) (2003). The USDA subsequently amended this regulation to conform the rule to the statute and to clarify the criteria by which a processor is determined to be permanently terminated. The rule defines permanently terminated operations as "(i) Not processing sugarcane or sugar beets for 2 consecutive years, or (ii) Notifying CCC that the processor has permanently terminated operations." *See* Flexible Marketing Allotments for Sugar, 69 Fed. Reg. 39,811, 39,813 (Jul. 1, 2004) (codified at 7 C.F.R. § 1435.308(b)(3)) (subsequently amended by 69 Fed. Reg. 48,765 (Aug. 11, 2004) and 71 Fed. Reg. 16,198 (Mar. 31, 2006)).

acquiring the processor or all of the processor's assets. Section 1359dd(b)(2)(F) provides:

> If a processor of beet sugar (or all of the assets of the processor) is sold to another processor of beet sugar, the Secretary ***shall*** transfer the allocation of the seller to the buyer unless the allocation has been distributed to other sugar beet processors under subparagraph (E).

§ 1359dd(2)(F) (emphasis added).

[2] Thus, the Act requires the USDA to eliminate and redistribute the allocation of a processor that has permanently terminated operations, except when the *processor* terminated operations because of a sale of the processor or all of its assets to another processor. *See* § 1359dd(b)(2)(E).[11] Even when the USDA has not previously eliminated an allocation, the fact that a processor has permanently terminated operations (other than in conjunction with a sale of the processor or all assets of the processor) cannot be ignored when the USDA is subsequently asked to transfer the allocation pursuant to a purported sale of the processor's assets.

[3] Reading the provisions together, before the USDA may grant an allocation transfer request pursuant to a sale, the Act requires: (1) that the buyer and seller are processors covered by the Act; (2) that the seller has not been dissolved, liquidated in a bankruptcy proceeding, or otherwise has not permanently terminated operations, other than in conjunction with the sale or other disposition of the processor or the assets of the processor; and (3) that

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[11] The USDA may find that a processor has temporarily reduced or stopped processing operations, in which case the statute gives the USDA authority to temporarily reassign a processor's allocation to other processors. *See* § 1359ee(b)(2).

the sale involves a sale of the processor or all of the assets of the processor. *See* § 1359dd(b)(2)(E)-(F).[12] If any of these conditions is not met, the USDA cannot approve the transfer pursuant to a sale. Amalgamated argues that the transfer was not proper because Pacific was no longer a processor, since it had permanently terminated operations before (and not in conjunction with) the purported sale of assets to American Crystal. The USDA and American Crystal both argue that subparagraph (F) required the USDA to transfer Pacific's allocation because the USDA had not previously eliminated and redistributed Pacific's allocation pursuant to subparagraph (E). The district court deferred to this interpretation, concluding that it was reasonable, not arbitrary or capricious, and supported by the administrative record. We disagree with the district court and agree with Amalgamated.

B. The District Court Erred When it Deferred to the USDA's Interpretation of the Statutory Term "Processor".

[4] The district court deferred to the USDA's interpretation of the statutory term "processor" in its decision, granting *Chevron* deference to the JO decision. We conclude that the district court erred. First, the term "processor" is not ambiguous as used

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[12] The related USDA regulation in effect in 2003 does not provide criteria for when a processor permanently terminates operations, but does provide: "Subject to paragraph (a) of this section [regarding requests from growers to transfer an allocation from a closed facility], CCC will eliminate the allocation of the processor who has been dissolved or liquidated in a bankruptcy proceeding and the allocation will be distributed to all other processors on a pro-rata basis." 7 C.F.R. § 1435.308 (2003).

in the Act. Second, the interpretation advanced by the USDA is not reasonable, because it is contrary to the USDA implementing regulation.

In reviewing the USDA's interpretation of a statute that it administers, the court must follow the two-step approach set out in *Chevron*, 467 U.S. at 842-44. The first step is to determine whether Congress has unambiguously expressed its intent on the issue before the court. *Natural Res. Def. Council v. U.S. E.P.A.*, 526 F.3d 591, 602 (9th Cir. 2008) (citing *Chevron*, 467 U. S. at 843 n.9). If the intent of Congress is clear, such as when the statute expressly defines the disputed term, the court "must follow that definition, even if it varies from that term's ordinary meaning." *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1238 (9th Cir. 2005) (quoting *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000)).

If the statute is silent or ambiguous, the court must then decide whether the agency's interpretation "is based on a permissible construction of the statute." *Natural Res. Def. Council*, 526 F.3d at 602 (citing *Chevron*, 467 U.S. at 843). Where Congress explicitly or implicitly delegates legislative authority to the agency, the court must defer to an agency's statutory interpretation so long as it is reasonable and not arbitrary and capricious. *Id.* The court must consider the agency's position over time, and if the agency's interpretation of a relevant provision conflicts with the agency's earlier interpretation, the agency is "entitled to considerably less deference than a consistently held agency view." *Id.* (citations omitted). This deference also does not extend to " 'agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.' " *Ashoff v. City of Ukiah*, 130 F.3d 409, 411 (9th Cir. 1997) (quoting *Bowen v.*

Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988)).

The agency's own regulations are significant and cannot be disregarded when interpreting a statute. *See Vance v. Hegstrom*, 793 F.2d 1018, 1025 (9th Cir. 1986). An agency's interpretation of its own regulation is not entitled to deference if it is "plainly erroneous or inconsistent with the regulation." *See Auer v. Robbins*, 519 U. S. 452, 461-63 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)). "A regulation has the force of law; therefore, an agency's interpretation of a statute in a manner inconsistent with a regulation will not be enforced." *Nat'l Med. Enters. v. Bowen*, 851 F.2d 291, 293 (9th Cir. 1988).

In this case, the Act does not define the terms "processor" or "processor of beet sugar." However, where a term is not ambiguous, its plain and ordinary meaning should be ascribed unless there is clear evidence to the contrary that Congress intended a different meaning. *See Seldovia Native Ass'n, Inc. v. Lujan*, 904 F.2d 1335, 1341 (9th Cir. 1990).

[5] We note that the term "processor" does not have any independent legal significance. One dictionary defines the word to mean "one that processes agricultural products, foods, or similar products." *See* Webster's Third New International Dictionary 1808 (1993). Two other common dictionaries likewise define "processor" as "one that processes." *See* The American Heritage College Dictionary 987 (2d ed. 1985); Webster's II New Riverside University Dictionary 938 (1984).

[6] Within the relevant provisions of the Act, we read "processor" to mean an entity who processes sugar, entirely within the natural and ordinary meaning of the word. For example, the Act requires the Secretary to establish allotments of sugar for

"marketing by processors of sugar processed from . . . sugar beets . . . ." *See* § 1359bb(b)(1). The sugar marketing allotments "shall apply to the marketing by *processors* of sugar . . ." § 1359bb(c)(1) (emphasis added). A "processor" is not allowed to market more sugar than it has been allocated. *See id.* at § 1359bb(d). The Act consistently uses "processor" to exclusively refer to that class of entities who process sugar. We find the term unambiguous and nothing in the Act contradicts or confuses the ordinary meaning.

[7] Within the Act, it is not receipt of an allocation that makes an entity a processor, but rather the processing of sugar beets that entitles one to an equitable allocation. The Act directs, and therefore presumes, that any entity that processes sugar will have an equitable opportunity to market sugar and therefore receive an allocation. § 1359dd(a).[13] The initial allocations were made to processors who had actual, historical production during the 1998-2000 crop years. § 1359dd(b)(2)(C). New processors, referred to as "new entrants," are equally entitled to an allocation under the Act when they start processing sugar beets or acquire an ongoing factory with a production history. § 1359dd(b)(2)(H)-(I). Maintenance of the allocation is also conditioned on continuing operations and processing of sugar. *Id.* at § 1359dd(b)(2)(E)-(F). Thus, we conclude that actual processing and capacity to produce sugar are what make an entity a processor, and it is this status as a processor that entitles it to an allocation.

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[13] The Act provides that "Whenever marketing allotments are established for a crop year under section [1359cc of this title], in order to afford all interested persons an equitable opportunity to market sugar under an allotment, the Secretary shall allocate each such allotment among the processors covered by the allotment." § 1359dd(a).

The USDA argues that if the ordinary meaning of the term is applied, then Pacific could not have received the original allocation on October 1, 2002, because by that time Pacific was no longer processing sugar. Likewise, the USDA contends that if Pacific were not a "processor," the USDA could not have temporarily reassigned Pacific's allocation to other processors for crop years 2002 and 2003.[14] We are not asked to review the propriety of the original allocations or the temporary reassignments made by the USDA under the Act. Nonetheless, we find it unlikely that Congress intended that the USDA give a defunct sugar company, incapable of processing or marketing sugar, a sugar marketing allocation. The fact that the USDA gave the defunct Pacific an original allocation, which it temporarily reassigned to other processors, has no impact on our interpretation of this unambiguous statutory term.

The USDA also urges that "processor" must mean an entity with an allocation, because the provisions regarding disposition of an allocation upon termination of operations or sale of assets uses that term, and the provisions would not apply unless a "processor" had an allocation. § 1359dd(b)(2)(E) & (F). This argument is not persuasive. As we stated above, the Act presumes that all processors will receive an equitable allocation, and therefore it is true that a processor would have or be entitled to an allocation. However, this does not mean that a processor is only a processor because it has an allocation.

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[14] If a processor with a share of the allotment will be unable to market all of the allocation during a particular crop year, the Secretary may temporarily reassign to the "deficit" for that crop year. §1359ee(b)(2). The reassignment is redistributed to the other processors depending on their capacity to fill a portion of the deficit. *Id.*

[8] To the extent that the USDA's argument exposes any ambiguity in the statute, which we do not believe it does, the USDA's interpretation is not reasonable and not entitled to deference, because it conflicts with the USDA's own implementing regulations. *See Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir. 1994) (refusing to defer to the USDA's construction of a statutory term because it was inconsistent with the plain language of the statute and contrary to the agency's own regulation). The USDA implementing regulation provides, "[s]ugar beet processor means a person who commercially produces sugar, directly or indirectly, from sugar beets (including sugar produced from sugar beet molasses), has a viable processing facility, and a supply of sugar beets for the applicable allotment year." 7 C.F.R. § 1435.2 (2003).[15] The district court acknowledged this regulatory definition, but concluded that the interpretation advanced by the USDA was "reasonable given the use of the word throughout the statute." We disagree. The USDA's proposed interpretation that a processor is an entity that has an allotment, even if it is not processing anything, is not reasonable, precisely because it conflicts with its own regulation. *See Nat'l Med. Enters.*, 851 F.2d at 293-94.

[9] Accordingly, we hold that the district court erred in deferring to the definition of the term "processor" advanced by the USDA. Within the Act, the term is unambiguous and used in a manner consistent with its natural and ordinary

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[15] This definition has not changed since the rule was first effected. *Compare* 2002 Farm Security and Rural Investment Act of 2002 Sugar Programs and Farm Facility Storage Loan Program, 67 Fed. Reg. 54,926, 54,930 (Aug. 26, 2002) *with* 7 C.F.R. § 1435.2 (2008).

meaning. The USDA's interpretation, advanced in the present dispute, not only conflicts with the ordinary meaning of the word but also conflicts with the USDA's own regulatory definition of the term.

C. Pacific Permanently Terminated Operations and Ceased Being a Processor Prior to the Purported Sale of Assets to American Crystal.

There is no dispute that Pacific was a sugar beet processor during the 1998 through 2000 crop years. Whether Pacific was a "processor" by the time it purported to sell its assets to American Crystal in September 2003 depends on when and under what circumstances Pacific permanently terminated operations. We conclude that Pacific ceased being a processor when it permanently terminated operations prior to the purported sale to American Crystal.

[10] After five days of evidentiary hearings, the ALJ found that Pacific had permanently terminated operations before the purported sale of assets to American Crystal. The record strongly supports this finding, given that Pacific had not processed sugar beets since February 2001. Pacific sold its factory and assets in June 2001 and had no sugar beet crops in 2001, 2002 or 2003. The State of Washington administratively dissolved Pacific in July 2001, even though it was subsequently reinstated in September 2003 in connection with the transaction with American Crystal. Pacific lost its lease and option to repurchase its factory in July 2002. Pacific's Board of Directors also adopted a December 2002 resolution purporting to convey its allocation to Washington Sugar and stating that "CRSC has no desire, interest or ability to move forward and operate [the Pacific]

processing facility." The JO did not refute these findings.

Instead, the JO reasoned that as long as the USDA had not previously eliminated the allocation, it was available to be transferred pursuant to a sale. There is no basis for this reasoning. The determinative factor on the availability of the allocation is whether a processor has permanently terminated operations, not whether the USDA has failed to act. If we upheld the interpretation advanced by the USDA, the propriety of a transfer would not depend on events in the sugar beet industry, as Congress intended, but on whether the USDA has been diligent in fulfilling its statutory duties. Allowing such an interpretation would result in an arbitrary and capricious outcome that would be contrary to the intent of Congress.

We also conclude that the USDA had a self-serving and, possibly, a financial interest in interpreting the Act to allow the transfer of Pacific's allocation to American Crystal. First, the USDA gained administrative advantage by conditioning approval of the transfer on (1) waiver by American Crystal and Pacific of rights to bring any action against the USDA in the event that the USDA is required by a court to reverse the transfer of the allocation; and (2) agreement by American Crystal to drop Pacific's appeal of the CCC's June 16, 2003 adverse ruling regarding Pacific's request to increase its allocation for 2003. The record also indicates that the USDA may have had a financial interest in approving the transfer. Pacific owed the USDA as much as $12.1 million after Pacific defaulted on a $20 million loan guaranteed by the USDA. Pacific received $3.025 million in payment from American Crystal for the sale of the allocation. As a creditor of

Pacific, the USDA may have had a financial interest in approving the transfer. Even if the USDA received no direct financial benefit, the existence of a possible pecuniary interest is of concern in evaluating the manner in which the USDA administered the Act and interpreted its provisions. We are troubled that the USDA may have acted more out of concern for administrative convenience and self-interest, rather than with an interest in administering the Act according to statutory requirements and Congressional intent.

Where an agency interprets or administers a statute in a way that furthers its own administrative or financial interests, the agency interpretation must be subject to greater scrutiny to ensure that it is consistent with Congressional intent and the underlying purpose of the statute. We acknowledge that "self-interest alone gives rise to no automatic rebuttal of deference." *See Independent Petroleum Ass'n of America v. DeWitt*, 279 F.3d 1036, 1040 (D.C. Cir. 2002). However, *Chevron* deference may be inappropriate where, as here, (1) the agency has a self-serving or pecuniary interest in advancing a particular interpretation of a statute, *and* (2) the construction advanced by the agency is arguably inconsistent with Congressional intent. *See Nat'l Fuel Gas Supply v. Fed. Energy Reg. Comm'n*, 811 F.2d 1563, 1571 (D.C. Cir. 1987) (noting that while an agency's interpretation of a statute incorporated into a contract may be entitled to deference, such deference may be inappropriate where the agency itself is a party to the contract); *Chevron*, 467 U. S. at 843 n. 9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

[11] The uncontradicted findings of the ALJ show that Pacific permanently terminated operations prior to the purported sale of assets to American Crystal. Accordingly, Pacific was no longer a processor at the time of the purported sale. Because the permanent cessation of operations requires redistribution, the USDA should have redistributed Pacific's allocation among all processors pro rata as required by law.

D. Termination of Operations Not in Conjunction with a Sale of All Assets.

The USDA argues that, even if Pacific terminated operations, the USDA was not required to redistribute the allocation among all processors, because Pacific permanently terminated operations in conjunction with a sale or other disposition of the processor or the assets of the processor. See § 1359dd(b)(2)(E). The JO agreed. The district court expressed concern that there was no sale of "all the assets of the processor," but nonetheless affirmed, finding the JO's conclusions to be reasonable and not arbitrary or capricious. We find this conclusion to be unreasonable and not supported by the record.

[12] American Crystal did not purchase Pacific itself. Thus, in order to satisfy the prerequisites for transfer, American Crystal must have purchased *all* of Pacific's assets. See § 1359dd(b)(2)(F). Yet, Pacific's assets were liquidated well before the purported sale to American Crystal. The factory and all Pacific's processing equipment had been previously liquidated and sold to Central Leasing. American Crystal acknowledged that Pacific's remaining assets largely included "the marketing allocation and some other generally immaterial assets."

The USDA and American Crystal argue that to satisfy the requirements of the Act, the asset sale

need only be "a sale of those assets that the processor has at the time, not those which the processor may have owned in the past." Therefore, the USDA argues that it is not relevant that the assets sold were immaterial so long as they include all the assets Pacific had at the time of the sale. We agree that the sale of all of Pacific's assets need not include all of the assets Pacific ever owned. However, the fact that Pacific had no material assets at the time of the sale is problematic.

[13] First, at the time of the sale to American Crystal, Pacific's only purported asset of any value was its marketing allocation. The JO concluded that "if a beet sugar processor has a beet sugar marketing allocation, that allocation can be sold in connection with a sale of the assets of the beet sugar processor." We conclude this to be an erroneous statement of the law. A marketing allocation can be transferred only upon a sale of all assets belonging to a processor. § 1359dd(b)(2)(F). Under the Act, however, while an allocation inevitably adds value to a processor, it is not an asset itself that can be owned or conveyed by the processor. As Amalgamated persuasively argues, an FMAS marketing allocation is "a right in the nature of a government license; it can be conveyed only by an act of the Secretary of Agriculture." The USDA has near plenary control over the allocations, subject to the mandates of the Act. The USDA must modify the allocations whenever a processor sells a factory or a new processor enters the industry, reopens a factory, or acquires an operating factory with a production history. *See* § 1359dd. The allocation is also subject to the requirement that it "be shared among producers served by the processors in a fair and equitable manner." *See* § 1359ff. When a processor closes, growers have the right to request

that the USDA transfer the allocation to an alternate processor where they will deliver their crops. The USDA can also temporarily reassign an allocation when a processor is unable to fully use it in a given crop year. *See* § 1359ee. Notably, the USDA is not required to compensate a processor for reductions in the allocation or seek the processor's permission. We conclude, as the ALJ did, that "[f]or there to be a 'sale of all assets,' more than the marketing allocation itself needs to be conveyed."[16]

[14] Second, assuming for the sake of argument that the sale of purely immaterial assets were sufficient, the fact that Pacific did not have any tangible assets of any value confirms that it was no longer a processor and that its permanent termination of operations was not in conjunction with but prior to and independent of the sale to American Crystal. We acknowledge that, if Pacific's only remaining assets were good will, production rights, production history, books, and records, it would not be unreasonable to conclude that American Crystal purchased *all* of Pacific's assets. However, this does not mean that Pacific was a processor at the time of the sale or that it terminated its operations in conjunction with the sale. Rather, the absence of material assets is a strong confirmation that Pacific permanently terminated operations prior to the sale.

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[16] The fact that American Crystal ultimately purchased from Central Leasing some of the assets formerly owned by Pacific does not affect our analysis. Central Leasing was not a sugar processor and never acquired Pacific's allocation. Therefore, a purchase of assets from Central Leasing does not entitle American Crystal to a transfer of Pacific's allocation. Under the Act, for the USDA to approve a transfer of an allocation in conjunction with the sale of assets, both the purchaser and seller must be processors. *See* § 1359dd(b)(2)(E).

We believe the reasoning of the ALJ is persuasive in determining that Pacific did not terminate operations in conjunction with the purported sale to American Crystal. If Pacific had retained the assets it sold to American Crystal, could it have continued operations? Pacific had no financing, no equipment, no sugar beet crop, no factory, no right to operate a factory, and had not produced sugar for over two years. As the ALJ noted, "The record in this case makes it abundantly clear that when the sale to American Crystal took place, Pacific Northwest was no longer able to ever again process beets into sugar. It had neither the physical assets [n]or the will."

IV. Conclusion

We are sympathetic to the principals and investors of Pacific who sought to salvage what value they might from their failed investment. We also recognize that it was good business for American Crystal to seek to secure Pacific's marketing allocation solely for itself. The transaction between Pacific and American Crystal was a crafty effort to circumvent the Act's clear directive and avoid an equitable redistribution of Pacific's allocation, in favor of a single processor. However, when a sugar processor permanently terminates operations, Congress mandated that the USDA fairly and equitably redistribute the failed processor's allocation among all processors. The USDA failed to fulfill its responsibilities in this regard. It put administrative expediency ahead of the intent of Congress and sanctioned a questionable transaction that was attempting to resurrect a dead company for the sole purpose of effecting the transfer of its sugar marketing allocation.

We reverse the district court's order granting

summary judgment in favor of the USDA and American Crystal. We remand for further proceedings consistent with this opinion. We award costs on appeal to Appellant, Amalgamated.

REVERSED and REMANDED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMALGAMATED SUGAR CO. LLC,
Plaintiff-Appellant,

v.

THOMAS VILSACK;* DEPT. OF AGRICULTURE,
Defendants-Appellees.

AMERICAN CRYSTAL SUGAR COMPANY,
Intervenor-Appellee.

No. 07-35971

D.C. No. CV-06-00167-EJL

OPINION

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Argued and Submitted
September 15, 2008—Moscow, Idaho

Filed February 11, 2009

Before: J. Clifford Wallace, Stephen S. Trott and N. Randy Smith, Circuit Judges.

Opinion by Judge N. R. Smith

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* Thomas Vilsack is substituted for his predecessor, Mike Johanns, as United States Secretary of Agriculture, pursuant to Fed. R. App. P. 43(c)(2).

COUNSEL

Kevin J. Brosch, DTB Associates, LLP, Washington, District of Columbia, for the plaintiff-appellant.

Jeffrey Kahn, Office of the General Counsel, U.S. Dept. of Agriculture, Washington, District of Columbia; Joanne P. Rodriguez, Assistant United States Attorney, United States Attorney's Office, Boise, Idaho, for the defendant-appellee.

David P. Bundle and Sarah C.S. McLaren, Fredrikson & Byron, PA, Minneapolis, Minnesota, for the intervenor-appellee.

OPINION

N.R. SMITH, Circuit Judge:

We are asked for the first time to review the construction and application of certain provisions of the Agricultural Adjustment Act (the "Act"), specifically 7 U.S.C. §§1359dd(b)(2)(E)-(F).[1] We conclude that the disputed provisions of the Act to be unambiguous; therefore, the district court erred in granting *Chevron* deference to the interpretation advanced by the U.S. Department of Agriculture (the "USDA"). Within the Act, we hold that a "processor" is an entity who processes sugar, as defined by the USDA's own regulations and entirely within the natural and ordinary meaning of the word. The Act requires the USDA to eliminate a processor's sugar marketing allocation ("allocation") when the processor has "permanently terminated operations (other than in conjunction with a sale or other

[1] All statutory references herein are to title 7, United States Code, unless otherwise noted, and therefore omit "7 U.S.C." from the citation.

disposition of the processor or the assets of the processor)." § 1359dd(b)(2)(E). We hold that Pacific Northwest Sugar Company ("Pacific") permanently terminated operations prior to and not in conjunction with the purported sale of assets to Defendant-Intervenor American Crystal Sugar Company ("American Crystal"). Therefore, we conclude that the USDA erred in approving the transfer of the allocation to American Crystal, and Pacific's sugar marketing allocation must be redistributed pro rata among all processors. § 1359dd(b)(2)(E). We reverse the district court's summary judgment in favor of the USDA and American Crystal.

I. Factual and Procedural History

Pacific processed sugar beets during the 1998, 1999, and 2000 crop years at its only factory in Moses Lake, Washington. Facing substantial financial problems, Pacific wrote to one of its creditors in January 2001, describing its financial problems, stating that Pacific could not continue to operate in the coming years, and proposing liquidation of the company. Pacific stopped processing sugar at Moses Lake in February 2001, had no sugar beet crops in 2002 or 2003, and never resumed operations. In June 2001, Pacific sold the Moses Lake facility to Central Leasing for $2.1 million and leased the plant back with a twelve-month option to repurchase the facility.[2] Also in June 2001, Pacific unsuccessfully attempted to secure capital to continue as a sugar beet processor. On July 23, 2001, Pacific was administratively dissolved by the Secretary of State of the State of Washington for failure to file an

[2] Although Central Leasing acquired Pacific's plant and equipment, it never sought to acquire Pacific's sugar allocation.

annual license renewal application, as required by Washington State law. Also in 2001, Pacific terminated the majority of its employees, and by April 2002, Pacific employed no one at its only factory. In March 2002, Pacific's lease of the Moses Lake facility from Central Leasing ended when Pacific failed to pay the agreed rent, and the lease was not renewed.

On May 13, 2002, Congress amended the Act,[3] creating the Flexible Marketing Allotments for Sugar ("FMAS") program. The purpose of the program was to stabilize sugar prices by requiring the Secretary of Agriculture (the "Secretary") to determine the total amount of domestically produced sugar that can be marketed in the United States for the coming year (the "allotment") and then assign allocations for production of sugar to processing companies in the United States. Section 1359cc.[4] By rule, the program is administered by the CCC, an agency of the USDA. 7 C.F.R. § 1435.1. Under the program, Congress directed the Secretary to make initial allocations based upon historical beet sugar production levels for the 1998 through 2000 crop years.

In June 2002, Central Leasing began disposing of the equipment formerly owned by Pacific. By July 2002, Pacific owned no sugar beet processing

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[3] *See* Farm Security and Rural Investment Act of 2002, Pub. L. No. 107- 171, 116 Stat. 134, 187-204 (May 13, 2002).

[4] The overall marketing allocation is divided between sugar derived from sugar beets and sugar derived from sugarcane. §1359cc(c). This case involves sugar beet sugar allocations. Sugar beet processors who knowingly market sugar or sugar products in excess of their allocation are liable to the Commodity Credit Corporation (the "CCC") for a civil penalty equal to three times the U.S. market value of the sugar involved in the violation. 7 C.F.R. § 1435.318(a).

equipment, and its option to repurchase the Moses Lake facility had expired. Also in July 2002, Pacific's Board of Directors indicated that it would no longer expend money for financial or legal consulting. The Board also announced that Washington Sugar Company, LLC ("Washington Sugar") would succeed Pacific and assume any debts or obligations relating to reviving processing operations at Moses Lake. On September 24 and October 3, 2002, Scott Lybbert, as President of Washington Sugar,[5] wrote to the CCC to request that Pacific's allocation be transferred to Washington Sugar. The CCC responded on October 11, 2002 that, as a "new entrant," the allocation would be transferred "upon receipt of a copy of the bill of sale showing that virtually all of the assets of Pacific Northwest, including the factory, have been acquired by the Washington Sugar Company."[6] During this same period, appellant, Amalgamated Sugar Company, LLC ("Amalgamated"), and others also inquired of the CCC about acquiring Pacific's allocation.

On October 1, 2002, the CCC made the initial beet sugar marketing allocations for crop year 2002. Pacific received an allocation of 2.692 percent of the allotment, based on its production history for the 1998-2000 crop years.[7] However, the USDA

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[5] The USDA never transferred the allocation to Washington Sugar, we assume because Washington Sugar could not provide a bill of sale showing that it had purchased virtually all of Pacific's assets.

[6] Lybbert was a former Vice-President of Pacific and a member of Columbia River Sugar Company ("CRSC"), as well as the sole owner of Washington Sugar.

[7] The USDA apparently interpreted the Act to require them to make an allocation to Pacific, despite the fact that Pacific was no longer processing sugar.

immediately reassigned virtually all the allocation, because Pacific was not processing sugar and was unable to market its share.

In a December 2002 USDA audit, the USDA Inspector General reported that because of financial difficulties, Pacific defaulted on a $20 million USDA guaranteed loan, which resulted in a loss of $12.1 million to the USDA's Rural Development Agency. The USDA audit stated that in May 2001, "[t]he plant closed and the lender was forced to liquidate the company's assets."

On December 3, 2002, the CRSC[8] adopted a resolution purporting to transfer its allocation to Washington Sugar, in support of Washington Sugar's efforts to revive operations at Moses Lake. The resolution stated, "CRSC has no desire, interest or ability to move forward and operate [the Pacific] processing facility."

After purporting to convey its interest in the allocation to Washington Sugar and despite the fact that Pacific never used any of its 2002 allocation, representatives of Pacific sought to have the allocation increased for crop year 2003. After a hearing on June 16, 2003, the CCC denied Pacific's request. During the hearing, several processors (including American Crystal) testified that Pacific had been dissolved or seemingly terminated operations and was unlikely to resume operations.[9]

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[8] CRSC is the sugar beet growers' association that wholly owned Pacific.

[9] For example, the President and CEO of Defendant-Intervenor American Crystal, wrote: "Pacific Northwest has not processed sugarbeets of the 2001 and 2002 crops, and it is our understanding that no sugarbeets have been planted for the 2003 crop. Therefore, it is a real question as to whether it will be able to continue operation in 2003. . . ."

In July 2003, American Crystal began negotiating with Lybbert (on behalf of Washington Sugar) and Central Leasing to purchase the assets previously owned by Pacific, in an effort to secure the transfer of Pacific's allocation by the CCC. On July 3, 2003, American Crystal wrote to the CCC, discussing the proposed acquisition:

> American Crystal[ ] is currently contemplating a transaction, which would effectively result in the allocation, currently owned by [Pacific], being transferred to [American Crystal]. As currently contemplated, substantially all of the assets of [Pacific] would be transferred to an intermediary company, [Washington Sugar]. Since [Pacific] has already transferred ownership of its former processing facility to another party (Central Leasing, LLC), *substantially all of the assets of [Pacific] consists* [sic] *mainly of the marketing allocation and some other generally immaterial assets.* The next step in the transaction would be the immediate transfer of substantially all of the assets of [Washington Sugar] to [American Crystal] . . . . The effect of the transaction would be to move the sugar marketing allocation from [Pacific], through [Washington Sugar], to [American Crystal].

(emphasis added).

On July 30, 2003, American Crystal informed the CCC of American Crystal's intent to "acquire ownership or control of the assets (including the rights to the production history and the marketing allocations), associated with the Moses Lake,

Washington sugarbeet processing factory." In the same letter to the CCC, American Crystal sought the CCC's preliminary approval and informed the CCC that American Crystal had no intention of ever operating the Moses Lake facility.

On August 28, 2003, the CCC replied: "We understand that American Crystal is purchasing all of the assets of Pacific Northwest, securing the rights to make sugar at the Pacific Northwest/Central Leasing factory site, and purchasing some of the sugar making equipment used by Pacific Northwest." The CCC also stated that it would condition approval of the transfer on: (1) receiving documentation of the purchase of Pacific's assets by American Crystal; (2) certification from Pacific that it had not marketed any sugar under the 2002 allocation; (3) waiver by American Crystal and Pacific of rights to bring any action against the USDA in the event that the USDA is required by a court to reverse the transfer of the allocation; and (4) agreement by American Crystal to drop Pacific's appeal of the CCC's June 16, 2003 adverse ruling regarding Pacific's request to increase its allocation for 2003.

On September 8, 2003, Pacific was reinstated as a legal corporation when it filed the necessary documents with the State of Washington. That same day, Washington Sugar also executed a cancellation agreement with Pacific, revoking the previous transfer of Pacific's allocation to Washington Sugar. These agreements were executed in conjunction with Pacific's purported conveyance of its allocation to American Crystal. That same day, American Crystal advised the CCC that it had acquired, through its wholly owned subsidiary Crab Creek Sugar Company "ownership or control of all of the assets (including the rights to the production history and the market-

ing allocations) associated with the production of sugar at the Moses Lake, Washington sugarbeet processing factory." American Crystal paid $6.8 million to acquire the allocation, including $2.125 million to Central Leasing, $300,000 to Lybbert (in consideration of a non-compete agreement), and $3.025 million to Pacific. On September 16, 2003, the CCC wrote to Lybbert to inform him that Pacific's allocation would immediately be transferred to American Crystal.

On December 4, 2003, Amalgamated filed a Petition for Review, administratively challenging the CCC's transfer decision. On February 7, 2005, the USDA's Administrative Law Judge ("ALJ") issued a decision ("Initial Decision") reversing the CCC's determination, finding that the transfer was not proper because Pacific had permanently terminated operations.

On February 28, 2005, the CCC appealed the decision to the USDA Judicial Officer ("JO"). The JO reversed the Initial Decision without a hearing and affirmed the CCC's determination. The JO construed the Act to mean that as long as the CCC had not eliminated and redistributed a processor's allocation, that allocation may be sold along with the processor's assets. Amalgamated subsequently appealed to the district court, seeking judicial review of the JO's decision. On cross-motions for summary judgment, the district court deferred to the USDA's construction of the Act and entered summary judgment in favor of the USDA and American Crystal. Amalagamated now appeals.

We are asked to decide whether the JO's interpretation of the Act was reasonable, supported by the administrative record, in accordance with the law, not arbitrary or capricious, and therefore

entitled to deference under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

II. Standard of Review

We review de novo the district court's decision on cross-motions for summary judgment. *Arakaki v. Hawaii*, 314 F.3d 1091, 1094 (9th Cir. 2002). We are governed by the same standard used by the trial court and must determine whether the district court correctly applied the relevant substantive law. *See McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008). The USDA's "interpretation or application of a statute is a question of law reviewed de novo." *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 765 (9th Cir. 2007).

The Administrative Procedure Act governs our review of agency action, and consequently, we must determine whether the USDA's decision was arbitrary, capricious, an abuse of discretion, or not in accordance with law. 5 U.S.C. § 706; *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 638 (9th Cir. 2004). Our review is "searching and careful, but the arbitrary and capricious standard is narrow, and we cannot substitute our own judgment for that of the [Agency]." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 858 (9th Cir. 2005) (internal quotation marks omitted).

III. The Act Guarantees an Equitable Opportunity to Market Sugar to All Processors

We begin by noting that the Act works to maintain sugar prices by limiting the total amount of sugar that can be produced and marketed, allocating the total sugar allotment for a given crop year among all sugar processors in a fair and equitable manner. *See* § 1359bb. The Act makes clear that its purpose is

to "afford all interested persons an equitable opportunity to market sugar under an allotment" and that "the Secretary shall allocate each such allotment among the processors covered by the allotment." § 1359dd(a). Because the Act places significant restrictions on the freedom of processors to produce and market sugar, the Act's overarching directive is to ensure predictable, fair, and transparent allocation of the allotments to reflect industry events and changes in industry conditions. *See* 148 Cong. Rec. S513, S514 (Feb. 8, 2002) (statement of Sen. Conrad) ("The purpose of this amendment is to provide a predictable, transparent, and equitable formula for the Department of Agriculture to use in establishing beet sugar marketing allotments in the future. . . . [T]he formula allows for adjustments in the reallocation of beet sugar allotments to account for such industry events as the permanent termination of operations by a processor, the sale of a processor's assets to another processor, the entry of new processors, and so on. Taken together, these provisions offer the predictability, fairness, and transparency we all agree is much needed in the sugarbeet industry.").

A. Permanent Termination of Operations Triggers the Requirement that an Allocation be Redistributed or Transferred.

In construing the provisions of the Act, we first look to the language of the statute to determine whether it has a plain meaning. *McDonald v. Sun Oil Co.*, 548 F.3d 774, 780 (9th Cir. 2008). "The preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there. Thus, our inquiry begins with the statutory

text, and ends there as well if the text is unambiguous." *Id.* (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (internal quotations omitted)). Here, we conclude that the statutory text is unambiguous.

[1] To maintain an equitable allocation among processors under the FMAS program, Congress directed the USDA to eliminate the allocation of a processor that permanently terminates operations and redistribute it equitably among *all* processors. Section 1359dd(b)(2)(E) provides:

> If a processor of beet sugar has been dissolved, liquidated in a bankruptcy proceeding, or otherwise has permanently terminated operations (other than in conjunction with a sale or other disposition of the processor or the assets of the processor), the Secretary ***shall*** —
>
> (i) eliminate the allocation of the processor provided under this section; and
>
> (ii) distribute the allocation to other beet sugar processors on a pro rata basis.

§ 1359dd(2)(E) (emphasis added).[10]

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[10] The related USDA regulation in effect in 2003 provides: that the "CCC will eliminate the allocation of the processor who has been dissolved or liquidated in a bankruptcy proceeding and the allocation will be distributed to all other processors on a pro-rata basis." 7 C.F.R. § 1435.308(b) (2003). The USDA subsequently amended this regulation to conform the rule to the statute and to clarify the criteria by which a processor is determined to be permanently terminated. The rule defines permanently terminated operations as "(i) Not processing sugarcane or sugar beets for 2 consecutive years, or (ii) Notifying CCC that the processor has permanently terminated operations." *See* Flexible Marketing Allotments for Sugar, 69 Fed. Reg. 39,811, 39,813 (Jul. 1, 2004) (codified at 7 C.F.R. § 1435.308(b)(3))

A single processor may receive and exclusively benefit from the allocation of another processor by acquiring the processor or all of the processor's assets. Section 1359dd(b)(2)(F) provides:

> If a processor of beet sugar (or all of the assets of the processor) is sold to another processor of beet sugar, the Secretary ***shall*** transfer the allocation of the seller to the buyer unless the allocation has been distributed to other sugar beet processors under subparagraph (E).

§ 1359dd(2)(F) (emphasis added).

[2] Thus, the Act requires the USDA to eliminate and redistribute the allocation of a processor that has permanently terminated operations, except when the *processor* terminated operations because of a sale of the processor or all of its assets to another processor. *See* § 1359dd(b)(2)(E).[11] Even when the USDA has not previously eliminated an allocation, the fact that a processor has permanently terminated operations (other than in conjunction with a sale of the processor or all assets of the processor) cannot be ignored when the USDA is subsequently asked to transfer the allocation pursuant to a purported sale of the processor's assets.

[3] Reading the provisions together, before the USDA may grant an allocation transfer request pursuant to a sale, the Act requires: (1) that the buyer and seller are processors covered by the Act; (2)

(subsequently amended by 69 Fed. Reg. 48,765 (Aug. 11, 2004) and 71 Fed. Reg. 16,198 (Mar. 31, 2006)).

[11] The USDA may find that a processor has temporarily reduced or stopped processing operations, in which case the statute gives the USDA authority to temporarily reassign a processor's allocation to other processors. *See* § 1359ee(b)(2).

that the seller has not been dissolved, liquidated in a bankruptcy proceeding, or otherwise has not permanently terminated operations, other than in conjunction with the sale or other disposition of the processor or the assets of the processor; and (3) that the sale involves a sale of the processor or all of the assets of the processor. *See* § 1359dd(b)(2)(E)-(F).[12] If any of these conditions is not met, the USDA cannot approve the transfer pursuant to a sale. Amalgamated argues that the transfer was not proper because Pacific was no longer a processor, since it had permanently terminated operations before (and not in conjunction with) the purported sale of assets to American Crystal. The USDA and American Crystal both argue that subparagraph (F) required the USDA to transfer Pacific's allocation because the USDA had not previously eliminated and redistributed Pacific's allocation pursuant to subparagraph (E). The district court deferred to this interpretation, concluding that it was reasonable, not arbitrary or capricious, and supported by the administrative record. We disagree with the district court and agree with Amalgamated.

B. The District Court Erred When it Deferred to the USDA's Interpretation of the Statutory Term "Processor".

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[12] The related USDA regulation in effect in 2003 does not provide criteria for when a processor permanently terminates operations, but does provide: "Subject to paragraph (a) of this section [regarding requests from growers to transfer an allocation from a closed facility], CCC will eliminate the allocation of the processor who has been dissolved or liquidated in a bankruptcy proceeding and the allocation will be distributed to all other processors on a pro-rata basis." 7 C.F.R. § 1435.308 (2003).

[4] The district court deferred to the USDA's interpretation of the statutory term "processor" in its decision, granting *Chevron* deference to the JO decision. We conclude that the district court erred. First, the term "processor" is not ambiguous as used in the Act. Second, the interpretation advanced by the USDA is not reasonable, because it is contrary to the USDA implementing regulation.

In reviewing the USDA's interpretation of a statute that it administers, the court must follow the two-step approach set out in *Chevron*, 467 U.S. at 842-44. The first step is to determine whether Congress has unambiguously expressed its intent on the issue before the court. *Natural Res. Def. Council v. U.S. E.P.A.*, 526 F.3d 591, 602 (9th Cir. 2008) (citing *Chevron*, 467 U. S. at 843 n.9). If the intent of Congress is clear, such as when the statute expressly defines the disputed term, the court "must follow that definition, even if it varies from that term's ordinary meaning." *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1238 (9th Cir. 2005) (quoting *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000)).

If the statute is silent or ambiguous, the court must then decide whether the agency's interpretation "is based on a permissible construction of the statute." *Natural Res. Def. Council*, 526 F.3d at 602 (citing *Chevron*, 467 U.S. at 843). Where Congress explicitly or implicitly delegates legislative authority to the agency, the court must defer to an agency's statutory interpretation so long as it is reasonable and not arbitrary and capricious. *Id.* The court must consider the agency's position over time, and if the agency's interpretation of a relevant provision conflicts with the agency's earlier interpretation, the agency is "entitled to considerably less deference than a consistently held agency view." *Id.* (citations

omitted). This deference also does not extend to " 'agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.' " *Ashoff v. City of Ukiah*, 130 F.3d 409, 411 (9th Cir. 1997) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)).

The agency's own regulations are significant and cannot be disregarded when interpreting a statute. *See Vance v. Hegstrom*, 793 F.2d 1018, 1025 (9th Cir. 1986). An agency's interpretation of its own regulation is not entitled to deference if it is "plainly erroneous or inconsistent with the regulation." *See Auer v. Robbins*, 519 U. S. 452, 461-63 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)). "A regulation has the force of law; therefore, an agency's interpretation of a statute in a manner inconsistent with a regulation will not be enforced." *Nat'l Med. Enters. v. Bowen*, 851 F.2d 291, 293 (9th Cir. 1988).

In this case, the Act does not define the terms "processor" or "processor of beet sugar." However, where a term is not ambiguous, its plain and ordinary meaning should be ascribed unless there is clear evidence to the contrary that Congress intended a different meaning. *See Seldovia Native Ass'n, Inc. v. Lujan*, 904 F.2d 1335, 1341 (9th Cir. 1990).

[5] We note that the term "processor" does not have any independent legal significance. One dictionary defines the word to mean "one that processes agricultural products, foods, or similar products." See Webster's Third New International Dictionary 1808 (1993). Two other common dictionaries likewise define "processor" as "one that processes." *See* The American Heritage College Dictionary 987 (2d ed. 1985); Webster's II New Riverside University Dictionary 938 (1984).

[6] Within the relevant provisions of the Act, we read "processor" to mean an entity who processes sugar, entirely within the natural and ordinary meaning of the word. For example, the Act requires the Secretary to establish allotments of sugar for "marketing by processors of sugar processed from . . . sugar beets . . ." *See* § 1359bb(b)(1). The sugar marketing allotments "shall apply to the marketing by *processors* of sugar . . ." § 1359bb(c)(1) (emphasis added). A "processor" is not allowed to market more sugar than it has been allocated. *See id.* at § 1359bb(d). The Act consistently uses "processor" to exclusively refer to that class of entities who process sugar. We find the term unambiguous and nothing in the Act contradicts or confuses the ordinary meaning.

[7] Within the Act, it is not receipt of an allocation that makes an entity a processor, but rather the processing of sugar beets that entitles one to an equitable allocation. The Act directs, and therefore presumes, that any entity that processes sugar will have an equitable opportunity to market sugar and therefore receive an allocation. § 1359dd(a).[13] The initial allocations were made to processors who had actual, historical production during the 1998-2000 crop years. § 1359dd(b)(2)(C). New processors, referred to as "new entrants," are equally entitled to an allocation under the Act when they start processing sugar beets or acquire an ongoing factory with a production history. § 1359dd(b)(2)(H)-(I). Maintenance of the allocation is also conditioned on

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[13] The Act provides that "Whenever marketing allotments are established for a crop year under section [1359cc of this title], in order to afford all interested persons an equitable opportunity to market sugar under an allotment, the Secretary shall allocate each such allotment among the processors covered by the allotment." § 1359dd(a).

continuing operations and processing of sugar. *Id.* at § 1359dd(b)(2)(E)-(F). Thus, we conclude that actual processing and capacity to produce sugar are what make an entity a processor, and it is this status as a processor that entitles it to an allocation.

The USDA argues that if the ordinary meaning of the term is applied, then Pacific could not have received the original allocation on October 1, 2002, because by that time Pacific was no longer processing sugar. Likewise, the USDA contends that if Pacific were not a "processor," the USDA could not have temporarily reassigned Pacific's allocation to other processors for crop years 2002 and 2003.[14] We are not asked to review the propriety of the original allocations or the temporary reassignments made by the USDA under the Act. Nonetheless, we find it unlikely that Congress intended that the USDA give a defunct sugar company, incapable of processing or marketing sugar, a sugar marketing allocation. The fact that the USDA gave the defunct Pacific an original allocation, which it temporarily reassigned to other processors, has no impact on our interpretation of this unambiguous statutory term.

The USDA also urges that "processor" must mean an entity with an allocation, because the provisions regarding disposition of an allocation upon termination of operations or sale of assets uses that term, and the provisions would not apply unless a "processor" had an allocation. § 1359dd(b)(2)(E) & (F). This argument is not persuasive. As we stated above,

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[14] If a processor with a share of the allotment will be unable to market all of the allocation during a particular crop year, the Secretary may temporarily reassign to the "deficit" for that crop year. § 1359cc(b)(2). The reassignment is redistributed to the other processors depending on their capacity to fill a portion of the deficit. *Id.*

the Act presumes that all processors will receive an equitable allocation, and therefore it is true that a processor would have or be entitled to an allocation. However, this does not mean that a processor is only a processor because it has an allocation.

[8] To the extent that the USDA's argument exposes any ambiguity in the statute, which we do not believe it does, the USDA's interpretation is not reasonable and not entitled to deference, because it conflicts with the USDA's own implementing regulations. *See Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir. 1994) (refusing to defer to the USDA's construction of a statutory term because it was inconsistent with the plain language of the statute and contrary to the agency's own regulation). The USDA implementing regulation provides, "[s]ugar beet processor means a person who commercially produces sugar, directly or indirectly, from sugar beets (including sugar produced from sugar beet molasses), has a viable processing facility, and a supply of sugar beets for the applicable allotment year." 7 C.F.R. § 1435.2 (2003).[15] The district court acknowledged this regulatory definition, but concluded that the interpretation advanced by the USDA was "reasonable given the use of the word throughout the statute." We disagree. The USDA's proposed interpretation that a processor is an entity that has an allotment, even if it is not processing anything, is not reasonable, precisely because it conflicts with its own regulation. *See Nat'l Med. Enters.*, 851 F.2d at 293-94.

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[15] This definition has not changed since the rule was first effected. *Compare* 2002 Farm Security and Rural Investment Act of 2002 Sugar Programs and Farm Facility Storage Loan Program, 67 Fed. Reg. 54,926, 54,930 (Aug. 26, 2002) *with* 7 C.F.R. § 1435.2 (2008).

[9] Accordingly, we hold that the district court erred in deferring to the definition of the term "processor" advanced by the USDA. Within the Act, the term is unambiguous and used in a manner consistent with its natural and ordinary meaning. The USDA's interpretation, advanced in the present dispute, not only conflicts with the ordinary meaning of the word but also conflicts with the USDA's own regulatory definition of the term.

C. Pacific Permanently Terminated Operations and Ceased Being a Processor Prior to the Purported Sale of Assets to American Crystal.

There is no dispute that Pacific was a sugar beet processor during the 1998 through 2000 crop years. Whether Pacific was a "processor" by the time it purported to sell its assets to American Crystal in September 2003 depends on when and under what circumstances Pacific permanently terminated operations. We conclude that Pacific ceased being a processor when it permanently terminated operations prior to the purported sale to American Crystal.

[10] After five days of evidentiary hearings, the ALJ found that Pacific had permanently terminated operations before the purported sale of assets to American Crystal. The record strongly supports this finding, given that Pacific had not processed sugar beets since February 2001. Pacific sold its factory and assets in June 2001 and had no sugar beet crops in 2001, 2002 or 2003. The State of Washington administratively dissolved Pacific in July 2001, even though it was subsequently reinstated in September 2003 in connection with the transaction with American Crystal. Pacific lost its lease and option to repurchase its factory in July 2002. Pacific's Board of Directors also adopted a December 2002 resolution

purporting to convey its allocation to Washington Sugar and stating that "CRSC has no desire, interest or ability to move forward and operate [the Pacific] processing facility." The JO did not refute these findings.

Instead, the JO reasoned that as long as the USDA had not previously eliminated the allocation, it was available to be transferred pursuant to a sale. There is no basis for this reasoning. The determinative factor on the availability of the allocation is whether a processor has permanently terminated operations, not whether the USDA has failed to act. If we upheld the interpretation advanced by the USDA, the propriety of a transfer would not depend on events in the sugar beet industry, as Congress intended, but on whether the USDA has been diligent in fulfilling its statutory duties. Allowing such an interpretation would result in an arbitrary and capricious outcome that would be contrary to the intent of Congress.

We also conclude that the USDA had a self-serving and, possibly, a financial interest in interpreting the Act to allow the transfer of Pacific's allocation to American Crystal. First, the USDA gained administrative advantage by conditioning approval of the transfer on (1) waiver by American Crystal and Pacific of rights to bring any action against the USDA in the event that the USDA is required by a court to reverse the transfer of the allocation; and (2) agreement by American Crystal to drop Pacific's appeal of the CCC's June 16, 2003 adverse ruling regarding Pacific's request to increase its allocation for 2003. The record also indicates that the USDA may have had a financial interest in approving the transfer. Pacific owed the USDA as much as $12.1 million after Pacific defaulted on a $20

million loan guaranteed by the USDA. Pacific received $3.025 million in payment from American Crystal for the sale of the allocation. As a creditor of Pacific, the USDA may have had a financial interest in approving the transfer. Even if the USDA received no direct financial benefit, the existence of a possible pecuniary interest is of concern in evaluating the manner in which the USDA administered the Act and interpreted its provisions. We are troubled that the USDA may have acted more out of concern for administrative convenience and self-interest, rather than with an interest in administering the Act according to statutory requirements and Congressional intent. Where an agency interprets or administers a statute in a way that furthers its own administrative or financial interests, the agency interpretation must be subject to greater scrutiny. *Chevron* deference is also inappropriate where an agency has a self-serving, pecuniary interest in advancing a particular interpretation of a statute. *Cf. Nat'l Fuel Gas Supply v. Fed. Energy Reg. Comm'n*, 811 F.2d 1563, 1571 (D.C. Cir. 1987) (noting that while an agency's interpretation of a statute incorporated into a contract may be entitled to deference, such deference may be inappropriate where the agency itself is a party to the contract).

[11] The uncontradicted findings of the ALJ show that Pacific permanently terminated operations prior to the purported sale of assets to American Crystal. Accordingly, Pacific was no longer a processor at the time of the purported sale. Because the permanent cessation of operations requires redistribution, the USDA should have redistributed Pacific's allocation among all processors pro rata as required by law.

D. Termination of Operations Not in

Conjunction with a Sale of All Assets.

The USDA argues that, even if Pacific terminated operations, the USDA was not required to redistribute the allocation among all processors, because Pacific permanently terminated operations in conjunction with a sale or other disposition of the processor or the assets of the processor. See § 1359dd(b)(2)(E). The JO agreed. The district court expressed concern that there was no sale of "all the assets of the processor," but nonetheless affirmed, finding the JO's conclusions to be reasonable and not arbitrary or capricious. We find this conclusion to be unreasonable and not supported by the record.

[12] American Crystal did not purchase Pacific itself. Thus, in order to satisfy the prerequisites for transfer, American Crystal must have purchased *all* of Pacific's assets. See § 1359dd(b)(2)(F). Yet, Pacific's assets were liquidated well before the purported sale to American Crystal. The factory and all Pacific's processing equipment had been previously liquidated and sold to Central Leasing. American Crystal acknowledged that Pacific's remaining assets largely included "the marketing allocation and some other generally immaterial assets."

The USDA and American Crystal argue that to satisfy the requirements of the Act, the asset sale need only be "a sale of those assets that the processor has at the time, not those which the processor may have owned in the past." Therefore, the USDA argues that it is not relevant that the assets sold were immaterial so long as they include all the assets Pacific had at the time of the sale. We agree that the sale of all of Pacific's assets need not include all of the assets Pacific ever owned. However, the fact that Pacific had no material assets at the time of the sale

is problematic.

[13] First, at the time of the sale to American Crystal, Pacific's only purported asset of any value was its marketing allocation. The JO concluded that "if a beet sugar processor has a beet sugar marketing allocation, that allocation can be sold in connection with a sale of the assets of the beet sugar processor." We conclude this to be an erroneous statement of the law. A marketing allocation can be transferred only upon a sale of all assets belonging to a processor. § 1359dd(b)(2)(F). Under the Act, however, while an allocation inevitably adds value to a processor, it is not an asset itself that can be owned or conveyed by the processor. As Amalgamated persuasively argues, an FMAS marketing allocation is "a right in the nature of a government license; it can be conveyed only by an act of the Secretary of Agriculture." The USDA has near plenary control over the allocations, subject to the mandates of the Act. The USDA must modify the allocations whenever a processor sells a factory or a new processor enters the industry, reopens a factory, or acquires an operating factory with a production history. *See* § 1359dd. The allocation is also subject to the requirement that it "be shared among producers served by the processors in a fair and equitable manner." *See* § 1359ff. When a processor closes, growers have the right to request that the USDA transfer the allocation to an alternate processor where they will deliver their crops. The USDA can also temporarily reassign an allocation when a processor is unable to fully use it in a given crop year. *See* § 1359ee. Notably, the USDA is not required to compensate a processor for reductions in the allocation or seek the processor's permission. We conclude, as the ALJ did, that "[f]or there to be a 'sale of all assets,' more than the marketing allocation

itself needs to be conveyed."[16]

[14] Second, assuming for the sake of argument that the sale of purely immaterial assets were sufficient, the fact that Pacific did not have any tangible assets of any value confirms that it was no longer a processor and that its permanent termination of operations was not in conjunction with but prior to and independent of the sale to American Crystal. We acknowledge that, if Pacific's only remaining assets were good will, production rights, production history, books, and records, it would not be unreasonable to conclude that American Crystal purchased *all* of Pacific's assets. However, this does not mean that Pacific was a processor at the time of the sale or that it terminated its operations in conjunction with the sale. Rather, the absence of material assets is a strong confirmation that Pacific permanently terminated operations prior to the sale. We believe the reasoning of the ALJ is persuasive in determining that Pacific did not terminate operations in conjunction with the purported sale to American Crystal. If Pacific had retained the assets it sold to American Crystal, could it have continued operations? Pacific had no financing, no equipment, no sugar beet crop, no factory, no right to operate a factory, and had not produced sugar for over two years. As the ALJ noted, "The record in this case

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[16] The fact that American Crystal ultimately purchased from Central Leasing some of the assets formerly owned by Pacific does not affect our analysis. Central Leasing was not a sugar processor and never acquired Pacific's allocation. Therefore, a purchase of assets from Central Leasing does not entitle American Crystal to a transfer of Pacific's allocation. Under the Act, for the USDA to approve a transfer of an allocation in conjunction with the sale of assets, both the purchaser and seller must be processors. *See* § 1359dd(b)(2)(E).

makes it abundantly clear that when the sale to American Crystal took place, Pacific Northwest was no longer able to ever again process beets into sugar. It had neither the physical assets [n]or the will."

IV. Conclusion

We are sympathetic to the principals and investors of Pacific who sought to salvage what value they might from their failed investment. We also recognize that it was good business for American Crystal to seek to secure Pacific's marketing allocation solely for itself. The transaction between Pacific and American Crystal was a crafty effort to circumvent the Act's clear directive and avoid an equitable redistribution of Pacific's allocation, in favor of a single processor. However, when a sugar processor permanently terminates operations, Congress mandated that the USDA fairly and equitably redistribute the failed processor's allocation among all processors. The USDA failed to fulfill its responsibilities in this regard. It put administrative expediency ahead of the intent of Congress and sanctioned a questionable transaction that was attempting to resurrect a dead company for the sole purpose of effecting the transfer of its sugar marketing allocation.

We reverse the district court's order granting summary judgment in favor of the USDA and American Crystal. We remand for further proceedings consistent with this opinion. We award costs on appeal to Appellant, Amalgamated.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

THE AMALGAMATED SUGAR COMPANY LLC,
Plaintiff,

v. Case No. 06-167-S-EJL

MIKE JOHANNS, SECRETARY OF AGRICULTURE AND UNITED STATES DEPARTMENT OF AGRICULTURE,
Defendants,

and

AMERICAN CRYSTAL SUGAR COMPANY,
Defendant-Intervenor.

MEMORANDUM ORDER

Pending before the Court in this matter are cross motions for summary judgment filed by each of the parties in this action and a motion to strike. The motions are fully briefed and the matters are now ripe for the Court's consideration. Having fully reviewed the record herein, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, this motion shall be decided on the record before this Court without oral argument. Local Rule 7.1(d)(2).

Factual and Procedural Background

The Agricultural Adjustment Act provides a program of Flexible Marketing Allocations for Sugar

which is a scheme to stabilize sugar prices by determining the total amount of domestically-produced sugar that can be marketed in the United States in the coming year and then providing marketing allotments and allocations for production of sugar to processing companies in the United States. 7 U.S.C. § 1359aa *et seq.*. Initial allocations under the Act were made to domestic sugar processors on October 1, 2002 based on the amount of each processor produced from 1998 through 2000. The United States Department of Agriculture ("USDA") is charged with administering this program.

Pacific Northwest Sugar Company's ("Pacific") was initially given a permanent allocation of 2.692% of the total beet sugar market allotment. At the same time, the USDA also temporarily redistributed the majority of Pacific's allotment pursuant to 7 U.S.C. § 1359ee(b)(2) because Pacific was unable to market its allocation. Under this provision Pacific retained its permanent allotment. In 2003, Pacific was sold and its market allotment transferred to Defendant-Intervener American Crystal Sugar Company ("American Crystal").[1]

The dispute in this case is over whether the USDA properly transferred Pacific's market allotment to American Crystal pursuant to 7 U.S.C. § 1359dd(b)(2)(F). The Plaintiff, Amalgamated Sugar Company LLC ("Amalgamated"), argues because Pacific was no longer processing sugar at the time of the transfer that the USDA should have redistributed Pacific's allocation to all sugar processors pursuant to 7 U.S.C. § 1359dd(b)(2)(E). Amalgamated argues

[1] American Crystal has been allowed to intervene in this action. (Dkt. No. 22).

Pacific ceased operations in 2001 and sold its assets, factory, and equipment to another entity, Central Leasing, and therefore was no longer a "processor" of sugar. American Crystal asserts that on September 8, 2003 it purchased all of Pacific's assets and that on September 16, 2003 the USDA properly approved of the transfer of Pacific's allocation to American Crystal pursuant to 7 U.S.C. § 1359dd(b)(2)(F); which allows such transfer upon the sale of all assets of one sugar processor to another.

Amalgamated sought reconsideration of the transfer decision arguing Pacific's allocation should have been redistributed to all sugar processors when it ceased its operations in 2001 pursuant to 7 U.S.C. § 1359dd(b)(2)(E). The request for reconsideration was denied and Amalgamated filed an administrative appeal. The USDA Administrative Law Judge ("ALJ") held two hearings totaling five days on the matter and, on February 7, 2005, he issued his Decision and Order reversing the USDA's decision and ordering it to take back the transferred allotment and redistribute the allocation under 7 U.S.C. § 1359dd(b)(2)(E); finding Pacific had terminated its operations prior to the sale to American Crystal.

Both the USDA and American Crystal appealed the decision to the USDA's Judicial Officer. On March 3, 2006 the Judicial Officer issued his Decision and Order reversing the ALJ and affirming the USDA's transfer of Pacific's allocation to American Crystal. Amalgamated now brings this action pursuant to the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*, seeking judicial review of the March 3, 2006 Decision and Order of the Judicial Officer as to the administrative proceeding In re Amalgamated Sugar Company, L.L.C. (SMA Docket

no. 04-0003) (AR 89). (Dkt. No. 1).[2] Amalgamated claims the decision is arbitrary, capricious, not in accordance with law, and contrary to USDA's own regulations.

Standards of Review

I. Administrative Review:

The USDA's interpretation of 7 U.S.C. §§ 1359dd(2)(E) and (F) is analyzed under the analytic framework laid out in Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). "When reviewing an agency's construction of a statute it is charged with administering, we look first to the statutory text to see whether Congress has spoken directly to the question at hand." J&G Sales Ltd. v. Truscott, 473 F.3d 1043, 1047 (9th Cir. 2007) (citation omitted). "If the statute is clear, we must give effect to the unambiguously expressed intent of Congress' regardless of the agency's

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[2] Specifically the Complaint alleges the following:

1) The finding that during the period 1998 through September 16, 2003, Pacific was a beet sugar processor is unsupported by the facts in the record.

2) The above finding is inconsistent with the finding that sugar beet processing operations at the Moses Lake factory ceased in February 2001 and never resumed and that no sugar beet crop was planted in 2002 or 2003.

3) The above finding is inconsistent with the definition of a "processor" in 7 C.F.R. § 1435.2 because Pacific did not commercially produce sugar, have a viable processing facility, or have a supply of sugar beets after February 2001.

4) The decision is unlawful because § 1359dd(b)(2)(E) required the USDA to redistribute the allocation because Pacific had ceased its operation in 2001.

5) The decision is arbitrary, capricious, and contrary to § 1359dd(b)(2)(F) because Pacific was no longer a processor of sugar beets.

view."[3] Northwest Ecosystem alliance v. United States Fish and Wildlife Serv., 475 F.3d 1136, 1141 (9th Cir. 2007) (citing Chevron, 467 U.S. at 842-44). "If the statute is ambiguous, however, we do not simply impose our own independent interpretation. Rather, we must determine how much deference to give to the administrative interpretation. Id. (citing United States v. Mead Corp., 533 U.S. 218, 227-31 (2001)). "The precise degree of deference warranted depends on the statute and agency action at issue." Id. "Under Chevron's classic formulation, [i]f Congress has explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Id. (quoting Chevron, 467 U. S. at 844). This standard of review is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." Id. (citations omitted). Courts should not "substitute [our] judgment for that of the agency." Id. (quoting Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U. S. 402, 416 (1971)). "Our task is simply to ensure that the agency considered the relevant factors and articulated a rational connection between the facts

[3] "If Chevron deference is inapplicable because Congress has not delegated interpretative authority to the agency, the agency's views still 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" Id. (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). The "fair measure of deference" may then range from "great respect" to "near indifference," depending on "the degree of the agency's care, its consistency, formality, and relative expertness, and ... the persuasiveness of the agency's position." Id. (quoting Mead, 533 U.S. at 228.)

found and the choices made." Id. (citing National Ass'n of Home Builders v. Norton, 340 F.3d 835, 841 (9th Cir. 2003) (citations and quotations omitted)).

"When reviewing an agency action to determine whether it is arbitrary and capricious, our scope of review 'is narrow and a court is not to substitute its judgment for that of the agency.'" Truscott, 473 F.3d at 1051 (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). "In this court, the review of whether an agency's action was arbitrary or capricious is highly deferential, presuming the agency action to be valid." Id. (citation omitted). "The agency must, of course, examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Id (citation and internal quotation marks omitted). "While we may not remedy deficient agency actions, courts will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." Id. at 1051 (internal quotation marks and citations omitted). "Moreover, where the agency's line-drawing does not appear irrational and the party challenging the agency action has not shown that the consequences of the line-drawing are in any respect dire courts will leave that line-drawing to the agency's discretion." Id. (citation and quotations omitted).

II. Standard on Summary Judgment:

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure which provides, in pertinent part, that judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The Supreme Court has made it clear that under Rule 56 summary judgment is mandated if the non-moving party fails to make a showing sufficient to establish the existence of an element which is essential to the non-moving party's case and upon which the non-moving party will bear the burden of proof at trial. See, Celotex Corp v. Catrett, 477 U.S. 317, 322 (1986). If the non-moving party fails to make such a showing on any essential element, "there can be no `genuine issue of material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 323.[4] When this standard, the Court must view all of the evidence in a light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Hughes v. United States, 953 F.2d 531, 541 (9th Cir. 1992).

Discussion

At issue here are the USDA's interpretation of two provisions of the Agricultural Adjustment Act, 7 U.S.C. §§ 1359dd(b)(2)(E), (F), which deal with the distribution of a processor's allocation upon dissolution/termination of a processor's operation or

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[4] See also, Rule 56(e) which provides, in part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

the sale of one processor to another processor and state:

> (E) Permanent termination of operations of a processor. If a processor of beet sugar has been dissolved, liquidated in a bankruptcy proceeding, or otherwise has permanently terminated operations (other than in conjunction with a sale or other disposition of the processor or the assets of the processor), the Secretary shall–
>
> (i) eliminate the allocation of the processor provided under this section; and
> (ii) distribute the allocation to other beet sugar processors on a pro rata basis.
>
> (F) Sale of all assets of a processor to another processor. If a processor of beet sugar (or all of the assets of the processor) is sold to another processor of beet sugar, the Secretary shall transfer the allocation of the seller to the buyer unless the allocation has been distributed to other sugar beet processors under subparagraph (E).

Amalgamated argues Pacific had terminated its operations as a "processor" prior to its sale and, therefore, § 1359dd(b)(2)(E) required the USDA to eliminate Pacific's allocation and redistribute the amount to all other processors on a *pro rata* basis. The USDA and Judicial Officer, however, determined that Pacific had been sold to American Crystal thereby invoking § 1359dd(b)(2)(F) which authorized the transfer of Pacific's allocation to American Crystal.

Amalgamated urges the Court to reverse the Judicial Officer and adopt the reasoning of the ALJ

and points to 7 C.F.R. § 1435.2 which defines a beet sugar processor as "a person who commercially produces sugar, directly or indirectly, from sugar beets ... has a viable processing facility, and a supply of sugar beets for the applicable allotment year." Pacific was not a "processor," Amalgamated argues, because Pacific had stopped processing sugar beets and sold its assets, factory, and equipment to Central Leasing in February of 2001; thus, the USDA should have reallocated Pacific's allotment under § 1359dd(b)(2)(E). To support this conclusion Amalgamated points out that Pacific was deeply in debt, had defaulted on its loans, had ceased processing sugar in February of 2001 and never resumed, had been administratively dissolved by the state of Washington in July 2001, lost its factory and equipment, laid off its employees, and defaulted on its lease agreement. In addition, Amalgamated notes that in 2002 Pacific's Board decided to terminate operations.

The Court has reviewed the Judicial Officer's Decision and finds the interpretation of the relevant statutes is reasonable, not arbitrary or capricious, and supported by the administrative record. Northwest Ecosystem Alliance, 475 F.3d 1143 (citation omitted) ("An agency interpretation that enjoys Chevron status must be upheld if it is based on a reasonable construction of the statute."). The Judicial Officer's interpretation of a "processor" as an entity with a market allocation is reasonable given the use of the word throughout the statute. Congress refers to "processors" throughout the statute as an entity with a market allocation; as opposed to a "new entrant" who is not a "processor" because they do not yet have a market allocation. See 7 U.S.C. §§ 1359dd(b)(2)(H), (G). The reasonableness of this

definition is apparent when reading the entire statute, including both subparagraphs (E) and (F) which refer to one another. To say that Pacific was not a "processor" under 7 U.S.C. § 1359dd(b)(2)(F), as Amalgamated argues, would also mean Pacific was not a "processor" under 7 U.S.C. § 1359ee(b)(2) and the USDA could not have temporarily reassigned Pacific's shares in 2002. Such a reassignment can be made only from a sugar beet processor who has an allocation but will be unable to market that allocation. Amalgamated was a beneficiary of this reassignment and made no challenge to the USDA's interpretation of Pacific as a processor for purposes of the reassignment. Thus, Pacific was a processor at the time of the sale because it retained its permanent allocation during this time even though, as Amalgamated points out, Pacific's business was struggling. As such, the Court finds the Judicial Officer's Decision's interpretation of the statue to be reasonable and supported by the record.

Amalgamated points to the ALJ Decision urging the Court to find its reasoning more compelling than that of the Judicial Officer. (Dkt. No. 46, p. 2). "When, as here, the findings of the ALJ differ from those of the final administrative decisionmaker, the following standards of review have been held to apply: The fact that the findings of the ALJ differ from those of the full board does not alter the requirement that we affirm [the final decisionmaker's] decisions if supported by substantial evidence. However, consideration of the ALJ's findings will require a more searching scrutiny of the record. Special deference is to be given the ALJ's credibility judgments." Pogue v. United States Dept. of Labor, 940 F.2d 1287, 1289 (9th Cir. 1991) (citation omitted). It has not escaped the Court's attention

that the ALJ arrived at the opposite conclusion from that of the USDA and the Judicial Officer. The ALJ concluded that Pacific had terminated its operations prior to September of 2003 and, therefore, the USDA should have redistributed the allocation pursuant to 7 U.S.C. § 1359dd(b)(2)(E). The ALJ discussed Pacific's downward spiral, much of which occurred prior to it obtaining its initial October 2002 allotment. The Judicial Officer also recognized that Pacific was failing in the sugar beet processing business at this time and selling off assets to minimize its losses. (AR 69, 89). However, the fact remains that although Pacific was not actually processing sugar beets in September of 2003 it still maintained its initial allotment of the sugar beet market and, as determined above, the Judicial Officer reasonably interpreted the statute to mean Pacific was a "processor" of sugar. (AR 89).

The more troubling part of the ALJ decision is the determination that there was no sale of "all the assets of the processor" to invoke a transfer of allocation under 7 U.S.C. § 1359dd(b)(2)(F) because Pacific's factory and equipment had already been sold and Pacific's Board had decided to not resume processing operations. (AR 69). The ALJ discusses at length his finding that the sale between Pacific and American Crystal was void of any true sale of tangible assets because there were no assets left to be sold and all that remained of Pacific was its market allocation; raising the concern that to allow such a sale to go forward allows an end-run around the requirements for new entrants in the sugar beet processing industry.[5] In reaching his decision, the

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[5] The ALJ pointing to the Commodity Credit Corporation's ("CCC") inconsistent treatment of the potential buyers of Pacific.

Judicial Officer considered this fact and ultimately concluding that the sale was appropriate to invoke the transfer of Pacific's allocation under 7 U.S.C. §§ 1359dd(b)(2)(F). (AR 89, pp. 15-23). The Judicial Officer determined that based upon the record in this case Pacific was a "processor" at the time of the September 8, 2003 sale, American Crystal purchased all of Pacific's assets, and, therefore, the USDA's transfer under 7 U.S.C. §§ 1359dd(b)(2)(F) was proper. Though the ALJ decided differently, the Court finds the Judicial Officer's decision to be reasonable. In reaching his decision, the Judicial Officer properly relied on the facts in the record, many of which are identical to the ALJ's findings, including the correspondence exchanged between the parties regarding the sale of Pacific. (AR 89). These letters evidence the fact that Pacific maintained its initial allocation at the time of the sale and that American Crystal had purchased all of Pacific's assets. Having considered the reasoning of both the ALJ and the Judicial Officer in light of the record, the Court finds the Judicial Officer's conclusions to be reasonable and not arbitrary or capricious based on the record in this case. (AR 89). Courts should not "substitute [our] judgment for that of the agency. Our task is simply to ensure that the agency "considered the relevant factors and articulated a rational connection between the facts found and the choices made." Northwest Ecology Alliance, *supra*. The Judicial Officer has done so here.

ORDER

THEREFORE IT IS HEREBY ORDERED as follows:

1) Defendants United States of America and

(AR 69, p. 36).

American Crystal Sugar Company motions for summary judgment (Dkt. Nos. 36, 37) are GRANTED.

2) Plaintiff's motion for summary judgment (Dkt. No. 33 is DENIED.

3) Plaintiff's motion to strike (Dkt. No. 49) is MOOT.

DATED: September 6, 2007

s/
Honorable Edward J. Lodge
U. S. District Judge

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re: SMA Docket No. 04-0003

Amalgamated Sugar Company, L.L.C.,

Petitioner.

Decision and Order

PROCEDURAL HISTORY

On September 16, 2003, the Commodity Credit Corporation, United States Department of Agriculture [hereinafter the CCC], transferred Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company. On October 2, 2003, Amalgamated Sugar Company, L.L.C. [hereinafter Petitioner], requested that the Executive Vice President, CCC [hereinafter the Executive Vice President], reconsider the September 16, 2003, decision. On November 14, 2003, the Executive Vice President determined on reconsideration that transfer of Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company was in accordance with the Agricultural Adjustment Act of 1938, as amended by section 1403 of the Farm Security and Rural Investment Act of 2002 [hereinafter the Agricultural Adjustment Act of 1938].

On December 4, 2003, Petitioner filed a Petition for Review pursuant to the Agricultural Adjustment Act of 1938, the Sugar Program regulations (7 C.F.R. pt. 1435) [hereinafter the Sugar Program Regulations], and the Rules of Practice Applicable to Appeals of Reconsidered

Determinations Issued by the Executive Vice President, Commodity Credit Corporation, Under 7 U.S.C. §§ 1359dd and 1359ff [hereinafter the Rules of Practice]. In January 2004, Wyoming Sugar Company, LLC, and Southern Minnesota Beet Sugar Cooperative intervened in support of Petitioner.

On December 23, 2003, the Executive Vice President filed: (1) an "Answer and Motion to Dismiss" in response to Petitioner's Petition for Review; (2) a certified copy of documents relating to Petitioner's October 2, 2003, request for reconsideration; and (3) a list of "affected persons."[1] On January 14, 2004, American Crystal Sugar Company intervened in support of the Executive Vice President. On March 25, 2004, American Crystal Sugar Company filed "American Crystal Sugar Company's Memorandum in Support of Its Motion to Dismiss the Appeal Petition or, in the Alternative, for Summary Judgment" During the period January 20, 2004, through May 21, 2004, Petitioner, Southern Minnesota Beet Sugar Cooperative, and American Crystal Sugar Company made numerous filings related to the Executive Vice President's motion to dismiss, American Crystal Sugar Company's motion to dismiss, and American Crystal Sugar Company's motion for summary judgment.

On June 23, 2004, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] issued an "Order Denying Motions to Dismiss and Motion For

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[1] Rule 2(c) of the Rules of Practice defines an "affected person" as a sugar beet processor, other than the petitioner, affected by the Executive Vice President's determination and identified by the Executive Vice President as an affected person. Rule 5(a) of the Rules of Practice requires that any answer filed by the Executive Vice President shall be accompanied by the names and addresses of affected persons.

Summary Judgment": (1) denying the Executive Vice President's motion to dismiss; (2) denying American Crystal Sugar Company's motion to dismiss; (3) denying American Crystal Sugar Company's motion for summary judgment; (4) ruling, pursuant to section 359i of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359ii), he had subject matter jurisdiction to hear and decide Petitioner's claim; (5) ruling Petitioner had a legally cognizable claim under the Agricultural Adjustment Act of 1938; and (6) ruling Petitioner is not barred under the doctrine of judicial estoppel from pursing its claim.

On September 20-21, 2004, Petitioner, Southern Minnesota Beet Sugar Cooperative, the Executive Vice President, and American Crystal Sugar Company, filed pre-hearing briefs. On September 21-23, 2004, and October 4-5, 2004, the ALJ conducted a hearing in Washington, DC. Kevin J. Brosch and John Lemke, DTB Associates, LLP, Washington, DC, represented Petitioner. Jeffrey Kahn, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Executive Vice President. Steven A. Adduci, Venable, LLP, Washington, DC, and David A. Bieging, Olsson, Frank and Weeda, P.C., Washington, DC, represented Southern Minnesota Beet Sugar Cooperative. Steven Z. Kaplan, David P. Bunde, and Daniel C. Mott, Fredrikson & Byron, P.A., Minneapolis, Minnesota, represented American Crystal Sugar Company.

In November 2004, Petitioner, Southern Minnesota Beet Sugar Cooperative, the Executive Vice President, and American Crystal Sugar Company filed post-hearing briefs. On February 7, 2005, the ALJ issued a "Decision" [hereinafter Initial Decision]: (1) reversing the Executive Vice President's

November 14, 2003, determination on reconsideration; and (2) ordering the CCC to distribute the amount of the beet sugar marketing allocation transferred to American Crystal Sugar Company from Pacific Northwest Sugar Company to all beet sugar processors in accordance with section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E)).

On February 28, 2005, Petitioner, Southern Minnesota Beet Sugar Cooperative, and the Executive Vice President appealed to the Judicial Officer. On March 7, 2005, American Crystal Sugar Company appealed to the Judicial Officer. On April 14, 2005, after Petitioner, Southern Minnesota Beet Sugar Cooperative, and American Crystal Sugar Company filed responses to the appeal petitions, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I reverse the ALJ's February 7, 2005, Initial Decision, and affirm the Executive Vice President's November 14, 2003, determination on reconsideration that the transfer of Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company was in accordance with the Agricultural Adjustment Act of 1938.

Petitioner's and Southern Minnesota Beet Sugar Cooperative's exhibits are designated by "AMAL-SM." American Crystal Sugar Company's exhibits are designated by "ACS." Exhibits from the certified copy of the record submitted by the Executive Vice President are designated as "AR." Exhibits from the addendum to the certified copy of the record submitted by the Executive Vice President are designated by "AR Addendum." The transcript is divided into five volumes, one volume for each day of

the 5-day hearing. References to "Tr. I" are to the volume of the transcript that relates to the September 21, 2004, segment of the hearing; references to "Tr. II" are to the volume of the transcript that relates to the September 22, 2004, segment of the hearing; references to "Tr. III" are to the volume of the transcript that relates to the September 23, 2004, segment of the bearing; references to "Tr. IV" are to the volume of the transcript that relates to the October 4, 2004, segment of the hearing; and references to "Tr. V" are to the volume of the transcript that relates to the October 5, 2004, segment of the hearing.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 35—AGRICULTURAL ADJUSTMENT ACT OF 1938

....

SUBPART VII—FLEXIBLE MARKETING ALLOTMENTS FOR SUGAR.

....

§ 1359dd. Allocation of marketing allotments

(a) Allocation to processors

Whenever marketing allotments are established for a crop year under section 1359cc of this title, in order to afford all interested persons an equitable opportunity to market sugar under an allotment, the Secretary shall allocate each such allotment among the processors covered by the allotment.

(b) Hearing and notice

....

(2) Beet sugar

....

(E) Permanent termination of operations of a processor

If a processor of beet sugar has been dissolved, liquidated in a bankruptcy proceeding, or otherwise has permanently terminated operations (other than in conjunction with a sale or other disposition of the processor or the assets of the processor), the Secretary shall-

(i) eliminate the allocation of the processor provided under this section; and

(ii) distribute the allocation to other beet sugar processors on a pro rata basis.

(F) Sale of all assets of a processor to another processor

If a processor of beet sugar (or all of the assets of the processor) is sold to another processor of beet sugar, the Secretary shall transfer the allocation of the seller to the buyer unless the allocation has been distributed to other beet processors under subparagraph (E).

7 U.S.C. 1359dd(a), (b)(2)(E)-(F) (Supp. III 2003).

7 C.F R.:

TITLE 7—AGRICULTURE

....

SUBTITLE B–REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

....

CHAPTER XIV—COMMODITY CREDIT CORPORATION, DEPARTMENT OF AGRICULTURE

....

PART 1435—SUGAR PROGRAM

....

Subpart D—Flexible Marketing Allotments For Sugar

....

§ 1435.319 Appeals and arbitration.

(a) A person adversely affected by any determination made under this subpart may request reconsideration by filing a written request with the Executive Vice President, CCC, detailing the basis of the request within 10 days of such determination. Such a request must be submitted at: Executive Vice President, CCC, Stop 0501, 1400 Independence Ave., SW, Washington, DC 20250-0501.

(b) For issues arising under §§ 359d, 359f(b) and (c), and 359(i) of the Agricultural Adjustment Act of 1938, as amended, after completion of the process in paragraph (a) of this section, a person adversely affected by a reconsidered determination may appeal such determination by filing a written notice of appeal within 20 days of the issuance of the reconsidered determination with the Hearing Clerk, USDA. The notice of appeal must be submitted at: Hearing Clerk, USDA, Room 1081, South Building, 1400 Independence Ave.,

SW., Washington, DC, 20250-9200. Any hearing conducted under this paragraph shall be by the Judicial Officer.

7 C.F.R. § 1435.319(a)-(b) (2003).

DECISION

Discussion

The Agricultural Adjustment Act of 1938 establishes flexible marketing allotments for sugar. The Secretary of Agriculture is required to establish flexible marketing allotments for sugar for any crop year in which allotments are required by the Agricultural Adjustment Act of 1938. If allotments are required, the Secretary of Agriculture establishes the overall allotment quantity in accordance with a statutory formula. The overall allotment quantity is then allocated between sugar derived from sugar beets and sugar derived from sugar cane.[2]

The Secretary of Agriculture is required to make allocations for beet sugar among beet sugar processors for each crop year that allotments are in effect on the basis of the adjusted weighted average quantity of beet sugar produced by beet sugar processors for each of the 1998 through 2000 crop years.[3] The Secretary of Agriculture is required to adjust the weighted average quantity of beet sugar produced by a beet sugar processor during the 1998 through 2000 crop years if the Secretary of Agriculture determines that the processor opened a sugar beet processing factory, closed a sugar beet processing factory, constructed a molasses desugarization facility, or suffered substantial quality

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[2] 7 U.S.C. § 1359cc (Supp. III 2003).

[3] 7 U.S.C. § 1359dd(b)(2)(A) (Supp. III 2003).

losses on stored sugar beets during any crop year from 1998 through 2000.[4]

The CCC determined the percentage of the overall beet sugar allotment to which each beet sugar processor was entitled based on the processor's weighted average quantity of beet sugar produced during the 1998 through 2000 crop years, as adjusted in accordance with the Agricultural Adjustment Act of 1938. Effective October 1, 2002, the CCC assigned to each beet sugar processor, including Pacific Northwest Sugar Company, a percentage of the weighted average quantity of beet sugar produced during the 1998 through 2000 crop years commensurate with the statutory formula. Pacific Northwest Sugar Company's share of the beet sugar allotment was 2.692 percent (AMAL-SM 78). Each beet sugar processor's share of the beet sugar allotment remains fixed for the life of the flexible marketing allotment provisions of the Agricultural Adjustment Act of 1938, unless the Secretary of Agriculture takes some action pursuant to the Agricultural Adjustment Act of 1938. Thus, if the CCC had taken no action, Pacific Northwest Sugar Company would have retained the right to market beet sugar under its allocation through crop year 2007.

The Agricultural Adjustment Act of 1938 provides for the elimination, distribution, assignment, reassignment, and transfer of a beet sugar processor's beet sugar marketing allocation under various circumstances.[5] Section 359d(b)(2)(F) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(F) (Supp. III 2003)) provides, if the

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[4] 7 U.S.C. § 1359dd(b)(2)(D) (Supp. III 2003).

[5] 7 U.S.C. § 1359dd(b)(2)(E)-(I) (Supp. 2003).

assets of a beet sugar processor are sold to another beet sugar processor, the Secretary of Agriculture is required to transfer the beet sugar marketing allocation of the seller to the buyer, unless the beet sugar marketing allocation has been previously distributed to other beet sugar processors under section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003)).

On September 8, 2003, Pacific Northwest Sugar Company sold its assets, including its beet sugar marketing allocation, to American Crystal Sugar Company (AR Addendum 236-49). On September 16, 2003, the CCC transferred Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company pursuant to section 359d(b)(2)(F) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(F) (Supp. III 2003)) (AR Addendum 250-51).

The only issues in this proceeding are: (1) whether Pacific Northwest Sugar Company and American Crystal Sugar Company were beet sugar processors on September 8, 2003; (2) whether Pacific Northwest Sugar Company sold its assets to American Crystal Sugar Company on September 8, 2003; and (3) whether the CCC had, prior to September 16, 2003, distributed Pacific Northwest Sugar Company's beet sugar marketing allocation to other beet sugar processors under section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003)). I find Pacific Northwest Sugar Company and American Crystal Sugar Company were beet sugar processors on September 8, 2003, when Pacific Northwest Sugar Company sold its assets, including its beet sugar marketing allocation, to American Crystal Sugar

Company. I also find, when the CCC transferred Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company on September 16, 2003, Pacific Northwest Sugar Company's beet sugar marketing allocation had not been previously distributed to other beet sugar processors under section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003)). Therefore, I conclude the CCC transferred Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company in accordance with the Agricultural Adjustment Act of 1938, and I affirm the Executive Vice President's November 14, 2003, determination on reconsideration that the transfer of Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company was in accordance with the Agricultural Adjustment Act of 1938.

Findings of Fact

1. The Columbia River Sugar Company was formed as a cooperative in 1991 to build and operate a sugar beet processing factory in Moses Lake, Washington. Sugar beets had been previously grown in the Columbia River Basin but the sugar beet processing factory located there had gone out of business and was inoperable. (ACS 1 at 3.)

2. Columbia River Sugar Company formed Pacific Northwest Sugar Company in partnership with Holly Sugar Company to construct the sugar beet processing factory, which took place in 1996 through the summer of 1998 (ACS 1 at 3; AMAL-SM 58 at 8).

3. In 1998, sugar beet processing was started at the Moses Lake factory under the direction

of Holly Sugar Company whose personnel had experience gained from operating other sugar beet processing factories. The Moses Lake operations did not go well. Equipment and system breakdowns caused frequent factory shutdowns for repairs and changes to the system. Approximately half of the sugar that went into its silos was unmarketable. The factory had a rate of recovery of sugar from the sugar beets it processed of only 25 percent and two-thirds of the sugar beets delivered to the factory were not processed, but instead rotted. (Tr. II at 51-52, 67; AMAL-SM 58 at 8.)

4. In 1999, Holly Sugar Company left the partnership conveying its interest in Pacific Northwest Sugar Company to Columbia River Sugar Company. That year, Pacific Northwest Sugar Company, operating the sugar beet processing factory without assistance from Holly Sugar Company, hired a number of experienced employees to operate the factory. Plant equipment was improved through the investment of several million dollars. The sugar recovery rate for the 1999-2000 processing season increased from 25 percent to 65 percent. However, to be profitable, a sugar beet processing factory requires a recovery rate in excess of 80 percent with 90 percent being the optimum target. (Tr. II at 52 - 67; Tr. V at 6-10, 23-24.)

5. In the 2000-2001 processing season Pacific Northwest Sugar Company made additional improvements to its operations at the factory and increased its sugar recovery rate to 82 percent (Tr. II at 66-67; Tr. V at 10-11, 25).

6. Pacific Northwest Sugar Company encountered numerous problems in connection with the operation of the Moses Lake, Washington, sugar beet processing factory, including financing issues,

the California energy crisis of 2000-2001, and a drought (AMAL-SM 58; Tr. II at 46-48, 61-66, 72-79, 85-109).

7. Sugar beet processing operations at the Moses Lake factory ceased in February 2001 and never resumed. No sugar beet crop was planted by Columbia River Sugar Company growers in 2002 or 2003. (Tr. 1 at 188; Tr. V at 11.)

8. On May 13, 2002, the Farm Security and Rural Investment Act of 2002 was approved. On October 1, 2002, the CCC announced the initial beet sugar marketing allocation for crop year 2002. The CCC provided Pacific Northwest Sugar Company a beet sugar marketing allocation of 2.692 percent of the future beet sugar allotment under the Agricultural Adjustment Act of 1938, on the basis of its beet sugar production during each of the 1998, 1999, and 2000 crop years. (AMAL-SM 78.)

9. Although the CCC provided Pacific Northwest Sugar Company with an initial beet sugar marketing allocation for crop year 2002, the CCC was legally empowered to redistribute any allocation that was not being used. On October 1, 2002, when the CCC announced initial allocations under the provisions of the Farm Security and Rural Investment Act of 2002, it simultaneously redistributed 87 percent (97,639 of 112,639 short tons) of Pacific Northwest Sugar Company's beet sugar marketing allocation to other beet sugar processors. During the remainder of that same crop year, the CCC subsequently redistributed an additional 24,023 short tons – nearly all the rest of Pacific Northwest Sugar Company's initial beet sugar marketing allocation, as well as any additional allocation that Pacific Northwest Sugar Company might have received because of increases in the total

beet sugar allotment — to other beet sugar processors. (Tr. IV at 149-54; AMAL-SM 78 at 1.)

10. Pacific Northwest Sugar Company sought to have its beet sugar marketing allocation increased for crop year 2003. On June 16, 2003, the Executive Vice President presided at a hearing on Pacific Northwest Sugar Company's application to increase its beet sugar marketing allocation. Subsequently, the Executive Vice President denied Pacific Northwest Sugar Company's request to increase its beet sugar marketing allocation. (ACS 23; AR Addendum at 7-88.)

11. American Crystal Sugar Company negotiated to purchase Pacific Northwest Sugar Company's assets. American Crystal Sugar Company's proposal to purchase Pacific Northwest Sugar Company's assets was described in a July 3, 2003, fax by Joseph Talley of American Crystal Sugar Company to Barbara Fesco, a CCC sugar program official (AR Addendum at 89-91), as follows:

> First, our understanding is that Pacific Northwest Sugar Company Sugar Company (PNSC) currently holds an allocation to sell sugar. The allocation was initially established as a result of the adoption of the Farm Security and Rural Investment Act of 2002 (Farm Bill). Since that time Pacific Northwest Sugar Company's allocation has not been permanently transferred from them nor terminated, but it has been reassigned (with such reassignment being valid only for the current fiscal year).
>
> American Crystal Sugar Company (ACSC) is currently contemplating a transaction

which would effectively result in the allocation, currently owned by PNSC, being transferred to ACSC. As currently contemplated, substantially all of the assets of PNSC would be transferred to an intermediary company (Washington Sugar Company (WSC)). Since PNSC has already transferred ownership of its former processing facility to another party (Central Leasing LLC), substantially all of the assets of PNSC consist mainly of the marketing allocation and some other generally immaterial assets. The next step in the transaction would be the immediate transfer of substantially all of the assets of WSC to ACSC (or perhaps a 100% owned subsidiary of ACSC). The effect of the transaction would be to move the sugar marketing allocation from PNSC, through WSC, to ACSC.

ACSC does not intend to process sugar beets in Moses Lake, WA after the completion of the transaction.

This transaction structure is clearly our preferred option. Although we did discuss other potential structures, which are outlined below, the alternative structures appear to be less favorable in terms of their complexity, cost and the risks that they would create for ACSC.

Our view of the potential transaction outlined here is that it fits within the area of Sec. 359d(b)(2)(F) of the sugar section of the Farm Bill. The allocation has not been eliminated under Sec. 359d(b)(2)(E), and

therefore since ACSC would be acquiring substantially all of the assets of a processor the transfer we are contemplating should be within the guidelines established by the Farm Bill. Our primary question for you is — do you agree that a transaction like this would be approved by the USDA?

We are also considering a couple of other alternative structures for this transaction. One would transfer the assets (primarily the marketing allocation) directly from PNSC to ACSC (or perhaps a 100% owned subsidiary of ACSC). From your perspective, would this additional aspect have any impact on whether or not the USDA would approve the transfer of the sugar marketing allocation?

Another would include the above aspects, plus ACSC acquiring control of the processing facility (that is now owned by Central Leasing LLC). From your perspective, would this additional factor have any impact on whether or not the USDA would approve the transfer of the sugar marketing allocation?

We also discussed the current appeal to the USDA by PNSC to increase their marketing allocation. Our view relative to that appeal has not changed from the position presented to you earlier by Jim Horvath, and we do not anticipate that the result of that appeal would have any impact on this potential transaction.

Since the USDA typically establishes

marketing allocations for the upcoming year before October 1, time is of the essence in this process.

12. On July 30, 2003, American Crystal Sugar Company's president, James J. Horvath, and Scott Lybbert for Washington Sugar Company, sent the CCC a fax that formally notified the CCC of American Crystal Sugar Company's intent to acquire ownership of the assets, including the rights to the production history and the beet sugar marketing allocation, associated with the Moses Lake, Washington, sugar beet processing factory (AR Addendum at 92-93), as follows:

> Mr. Dan Colacicco
> United States Department of Agriculture
> Farm Service Agency
> 1400 Independence Ave., SW
> Room 3752-S, Stop 0516
> Washington, DC 20250-0516
>
> Re: Marketing Allocation Transfer
>
> Dear Mr. Colacicco:
>
> We are writing to make you aware of a series of pending transactions by which American Crystal Sugar Company ("ACSC") will acquire ownership or control of the assets (including the rights to the production history and the marketing allocations), associated with the Moses Lake, Washington sugarbeet processing factory (the "Factory"). The purpose of this letter is to request the USDA's preliminary approval of these transactions as they relate to the transfer of the marketing

allocation currently held by the Pacific Northwest Sugar Company, LLC, ("PNSC") to ACSC.

As you know, PNSC currently holds a marketing allocation representing approximately 2.7% of the beet sugar allotment (the "Allocation"). The Allocation was based on PNSC's historical operation of the Factory. PNSC has reached an agreement with the Washington Sugar Company, LLC ("WSC") by which WSC has acquired substantially all of the assets of PNSC, including PNSC's rights to the Allocation. Our understanding is that documentation of this agreement has previously been provided to the USDA, Central Leasing, LLC, ("Central Leasing") an unrelated third party, is the current owner of the Factory.

Through a series of transactions with WSC and Central Leasing, ACSC (or its wholly owned subsidiary) will gain control of both the Factory's ability to produce sugar and the rights to claim the production history and the related Allocation. The Agreement with WSC will provide that the assets it acquired from PNSC, including the Allocation, will be transferred to ACSC. ACSC will simultaneously gain control of the sugar production capabilities of the Factory through a series of contracts with Central Leasing. ACSC will also be obtaining non-competition agreements from WSC. Central Leasing and the principal owners of these entities. ACSC is

confident that this combination of agreements will provide ACSC with control of the sugar production capabilities of the Factory and will prevent a "new entrant" from operating the Factory, for the foreseeable future.

Given the fact that the Factory is not currently operating (and there are no growers currently raising sugarbeets in the vicinity of the Factory), it is ACSC's intention that the Factory will not operate in the future as a sugar beet processing facility. In fact, much of the sugar production equipment at the Factory may be used at other ACSC facilities or sold to third parties for use elsewhere. We currently plan to have restrictions in the various agreements that would limit sales of certain key pieces of sugar production equipment to third parties operating outside of North or South America.

The parties are hereby requesting the USDA's preliminary approval of the transfer of the Allocation from PNSC to ACSC based upon the transactions outlined above. The provisions of Section 359d(b)(2)(F) of the 2002 Farm Bill address the transfer of marketing allocations in connection with the sale of assets of one processor to another. Subparagraph (F) provides as follows:

> (F) Sale of all assets of a processor to another processor—If a processor of beet sugar (or all of the assets of the

processor) is sold to another processor of beet sugar, the Secretary shall transfer the allocation of the seller to the buyer unless the allocation has been distributed to other sugar beet processors under subparagraph (E).

In this case, the series of transactions described above will result in ACSC acquiring the assets currently owned by WSC/PNSC, including the production history and all rights to the Allocation. As of the date of this letter, the USDA has not distributed the Allocation to other sugarbeet processors under subparagraph (E). Given these facts, the provisions of subparagraph (F) provide that the Secretary is to transfer the entire Allocation from PNSC to ACSC. Furthermore, the transfer of the Allocation will not be subject to any pro ration or future operating requirements.

The parties are currently in the process of finalizing the terms of the various documents and agreements necessary to implement the transactions described above. It is anticipated that these transactions will close on or about August 15, 2003. The parties would appreciate your preliminary approval of the Allocation transfer in advance of the closing. We anticipate that final USDA action to transfer the Allocation will not occur until after the closing.

Should you have any questions regarding the proposed transactions or if you require any additional details concerning the contractual arrangements, please feel free to contact either Joe Talley at American Crystal Sugar Company or Scott Lybbert at Washington Sugar Company, LLC. We would also be happy to meet with representatives of the USDA to discuss this matter in greater detail.

Thank you for your consideration, and we look forward to your response.

Very truly yours,

AMERICAN CRYSTAL SUGAR COMPANY

WASHINGTON SUGAR COMPANY, LLC

13. On August 28, 2003, the CCC replied to American Crystal Sugar Company's and Scott Lybbert's letter of July 30, 2003, advising that the CCC would transfer Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company if provided with documentation showing that all the assets of Pacific Northwest Sugar Company have been purchased by American Crystal Sugar Company (AR Addendum at 234-35), as follows:

Mr, Scott Lybbert
Pacific Northwest Sugar Company
3501 West 42nd Avenue
Kennewick, WA 99337

Dear Mr. Lybbert:

Thank you for your letter of July 30, 2003, advising us of the pending transactions between the American Crystal Sugar Company (American Crystal) and the Pacific Northwest Sugar Company (Pacific Northwest). We understand that American Crystal is purchasing all of the assets of Pacific Northwest, securing the rights to make sugar at the Pacific Northwest/Central Leasing factory site, and purchasing some of the sugar making equipment used by Pacific Northwest.

Section 359d(b)(2)(F) of the Agriculture [sic] Adjustment Act of 1938, as amended, requires the Department of Agriculture (USDA) to transfer a processor's sugar marketing allocation when all of the assets of a processor are sold to another processor. Therefore, the Commodity Credit Corporation (CCC) will transfer Pacific Northwest's allocation to American Crystal, upon receipt of the documents listed below. We will accomplish the transfer of allocation by transferring all of Pacific Northwest's production history during the base period to American Crystal, in the same manner that we transferred the production history of the Holly Sugar's factories to American Crystal when American Crystal purchased the Holly factories.

We will require the following documentation before we will transfer the allocation:

- Settlement documents showing that all of the assets of Pacific Northwest have been purchased by American Crystal, that American Crystal has secured the rights to make sugar at the Pacific Northwest/Central Leasing facility, and that American Crystal has purchased some equipment (including the diffuser and the molasses desugaring equipment from Central Leasing that Pacific Northwest used to make sugar.
- Certification from Pacific Northwest that its [sic] has not marketed any sugar under its 2002–crop sugar marketing allocation, if American Crystal wishes CCC to transfer the Pacific Northwest's 2002–crop allocation to American Crystal.
- American Crystal and Pacific Northwest must each agree in writing to waive their respective rights, if any, to bring an action against the Secretary of Agriculture, USDA and any agency thereof including CCC, and any official of the Department, in the event USDA is required by a Court to reverse the transfer of the allocation to American Crystal as a result of legal action by a third party challenging the original transfer from Pacific Northwest to American Crystal.
- American Crystal must agree in writing to drop Pacific Northwest's appeal of CCC's adverse decision regarding its request for an increased allocation

because Pacific Northwest suffered a quality loss on stored beets and built a desugaring facility.

Notwithstanding the foregoing, the USDA agrees that it will vigorously defend any third party challenge to the transfer of the allocation and will seek to provide the opportunity for American Crystal to participate in the defense of the USDA decision to transfer the allocation.

An identical letter is being sent to Mr. Horvath.

14. On September 8, 2003, American Crystal Sugar Company advised the CCC that, through its wholly-owned subsidiary, Crab Creek Sugar Company, it acquired, that day, ownership or control of all of the assets (including the rights to the production history and the beet sugar marketing allocation) associated with the production of sugar at the Moses Lake, Washington, sugarbeet processing factory. American Crystal Sugar Company's September 8, 2003, letter went on to positively address the requirements for the transfer the CCC specified in its August 28, 2003, letter. A bill of sale was attached. (AMAL-SM 70 at 1; AR Addendum at 243-49.)

15. On September 16, 2003, the CCC wrote to Scott Lybbert informing him that, effective immediately, the CCC was transferring Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company (AR Addendum at 250), as follows:

Mr. Scott Lybbert
Vice-President Finance and Marketing

Pacific Northwest Sugar Company
3501 West 42nd Avenue
Kennewick, Washington 99337

Dear Mr. Lybbert:

This letter is to inform you that the Department of Agriculture (USDA) will transfer, effective immediately, the marketing allocation of the Pacific Northwest Sugar Company (Pacific Northwest) to American Crystal Sugar Company (American Crystal). On the basis the documents you sent to us by facsimile on September 9, 2003, and the withdrawal of Petition for Review, SMA Docket No. 03-0003, USDA has determined that all assets of Pacific Northwest have been sold to American Crystal and that all documentation USDA required in an August 28, 2003 letter to you for proceeding with the transfer of allocation, has been received.

The transfer of allocation will be accomplished by transferring all of Pacific Northwest's production history during the base period to American Crystal (enclosure).

Thank you for your diligence in meeting all our requirements.

16. American Crystal Sugar Company paid $6.8 million to acquire Pacific Northwest Sugar Company's beet sugar marketing allocation. The following payments were made from an escrow account (ACS 67 at 30-36; Tr. I at 137-39):

Central Leasing	$2,125,000
Scott Lybbert	$ 300,000
Pacific Northwest Sugar Company	$3,025,000

The $300,000 paid from the escrow account to Scott Lybbert was designed to be an initial payment on a "non-complete" agreement with the balance to be paid him over a so-called "earn out" period of time, for $1.65 million total going to him (Tr. I at 138-39).

17. After acquiring the beet sugar marketing allocation, American Crystal Sugar Company realized it could not fully use all of it. American Crystal Sugar Company contacted other beet sugar processors and leased them portions of American Crystal Sugar Company's allocation for undisclosed sums. The other beet sugar processors who leased portions of American Crystal Sugar Company's beet sugar marketing allocation were Michigan Sugar Company and Minn-Dak Farmers Cooperative and because of confidentiality agreements American Crystal Sugar Company has with each of them, American Crystal Sugar Company was not required to reveal the amounts it has received under the lease arrangements. (ACS 85-91, 93; Tr. I at 155-56, 159-66; Tr. V at 121-24.)

18. At all times material to this proceeding, American Crystal Sugar Company was a beet sugar processor. During the period 1998 through September 16, 2003, Pacific Northwest Sugar Company was a beet sugar processor.

19. At no time material to this proceeding did the CCC distribute Pacific Northwest Sugar Company's beet sugar marketing allocation to other beet sugar processors under section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003)).

Conclusion of Law

The CCC's September 16, 2003, transfer of Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company was in accordance with the Agricultural Adjustment Act of 1938.

The Executive Vice President's Appeal Petition and American Crystal Sugar Company's Appeal Petition

The Executive Vice President and American Crystal Sugar Company each request that I reverse the ALJ's February 7, 2005, Initial Decision and affirm the Executive Vice President's November 14, 2003, determination on reconsideration or remand the matter to the Executive Vice President to make a determination based on the evidence presented to the ALJ.

This proceeding involves the CCC's September 16, 2003, decision to allow the sale of a beet sugar marketing allocation from Pacific Northwest Sugar Company to American Crystal Sugar Company under section 359d(b)(2)(F) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(F) (Supp. III 2003)). The Agricultural Adjustment Act of 1938 provides, if a beet sugar processor has a beet sugar marketing allocation, that allocation can be sold in connection with the sale of the assets of the beet sugar processor. The record clearly reflects that on September 8, 2003, Pacific Northwest Sugar Company still had its beet sugar marketing allocation, which it sold that day to American Crystal Sugar Company. Section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003)) provides that the

Secretary of Agriculture shall eliminate and distribute the allocation of a processor which has permanently terminated operations other than in conjunction with the sale or other disposition of the processor or the assets of the processor. Section 359d(b)(2)(F) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(F) (Supp. III 2003)) provides that a processor's allocation can be sold if the allocation has not previously been eliminated and distributed. On September 16, 2003, when the CCC transferred Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company, no previous distribution of Pacific Northwest Sugar Company's beet sugar marketing allocation to other beet sugar processors had been made, as is fully reflected in the ALJ's February 7, 2005, Initial Decision.

The ALJ finds this reading of section 359d(b)(2)(E)-(F) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E)-(F) (Supp. III 2003)) too simplistic (Initial Decision at 30-31). I disagree. The plain language of section 359d(b)(2)(E)-(F) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E)-(F) (Supp. III 2003)) provides, if a processor still has an allocation, the processor may sell that allocation along with the processor's assets to another processor, and, under those circumstances, the Secretary of Agriculture is required to transfer the allocation of the selling processor to the buying processor.

I find no purpose would be served by remanding this proceeding to the Executive Vice President to make a determination based on the evidence presented to the ALJ The facts presented to the ALJ and found by the ALJ support the Executive Vice President's November 14, 2003, determination

on reconsideration. Therefore, I reverse the ALJ's February 7, 2005, Initial Decision and affirm the Executive Vice President's November 14, 2003, determination on reconsideration.

Petitioner's and Southern Minnesota Beet Sugar Cooperative's Appeal Petition

Petitioner and Southern Minnesota Beet Sugar Cooperative raise one issue in the "Notice of Appeal to the Judicial Officer by Amalgamated Sugar Company, L.L.C. and Southern Minnesota Beet Sugar Cooperative." Petitioner and Southern Minnesota Beet Sugar Cooperative contend the ALJ erroneously limited his order to "future crop years."

The ALJ ordered the distribution, in future crop-years, of the beet sugar marketing allocation transferred to American Crystal Sugar Company from Pacific Northwest Sugar Company to all beet sugar processors, as follows:

> [T]he Reconsidered Determination by the Executive Vice President of the CCC that is the subject of the appeal is hereby reversed. Upon this decision becoming final and effective, CCC shall distribute, in future crop years, the amount of marketing allocation that was transferred to American Crystal from Pacific Northwest to all beet sugar processors on a pro rata basis in accordance with 7 U.S.C. § 1359dd(b)(2)(E) of the Act.

Initial Decision at 37.

I reverse the ALJ's February 7, 2005, Initial Decision ordering the CCC to distribute the amount of the beet sugar marketing allocation that was

transferred to American Crystal Sugar Company from Pacific Northwest Sugar Company to all beet sugar processors in accordance with section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. HI 2003)). Therefore, I reject Petitioner's and Southern Minnesota Beet Sugar Cooperative's request that I immediately distribute the amount of the beet sugar marketing allocation that was transferred to American Crystal Sugar Company from Pacific Northwest Sugar Company to all beet sugar processors in accordance with section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003)).

For the foregoing reasons, the following Order should be issued.

ORDER

1. The ALJ's February 7, 2005, Initial Decision is reversed.

2. The Executive Vice President's November 14, 2003, determination on reconsideration that the transfer of Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company was in accordance with the Agricultural Adjustment Act of 1938, is affirmed.

RIGHT TO JUDICIAL REVIEW

Petitioner has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Petitioner must seek judicial review within 60 days after entry of the Order in this Decision and Order.[6]

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[6] See 28 U.S.C. § 2344.

The date of entry of the Order in this Decision and Order is March 3, 2006.

Done at Washington, DC

March 3, 2006

s/

William G. Jenson
Judicial Officer

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE. SECRETARY OF AGRICULTURE

In re: SMA Docket No. 04-0003

Amalgamated Sugar Company, L.L.C.

Petitioner

DECISION

Petitioner, Amalgamated Sugar Company ("Amalgamated"), is a sugar beet processor appealing a decision by the Commodity Credit Corporation ("CCC") that allowed a competitor, American Crystal Sugar Company ("American Crystal") to acquire all of the sugar beet marketing allocation formerly held by a different processor, Pacific Northwest Sugar Company ("Pacific Northwest", "PNW" or "PNSC"). Allocations for the marketing of beet sugar among beet sugar processors are applicable each crop year that allotments are in effect under the Agricultural Adjustment Act of 1938, as amended by the Farm Security and Rural Investment Act of 2002 (7 U.S.C. §§ 1359 aa-kk) ("Act" for the Act as amended, and "2002 Farm Bill" for the 2002 amendatory provisions). The initial decision granting the transfer was made by CCC on September 16, 2003. In response to Petitioner's request for reconsideration, the CCC's Executive Vice President on November 14, 2003, issued a Reconsidered Determination denying the requested overturn of the decision. Petitioner's appeal from the Reconsidered Determination was filed pursuant to 7 U.S.C. § 1359 ii and the Rules of

Practice issued under 7 C.F.R. §1435.320(b)[1]. The Act and the Rules of Practice provide for a hearing on the appeal by an Administrative Law Judge in accordance with 5 U.S.C. §§ 554 and 556 ("the Administrative Procedure Act", or "the APA"), and for intervention in the proceeding by affected persons. My decision as the assigned Administrative Law Judge, is based on the certified copy of the Administrative Record ("A.R.") upon which the Executive Vice President based his Reconsidered Determination, matters that have been officially noted, the transcribed testimony and exhibits received at the hearing and proposed findings of fact, conclusions, orders and briefs by the parties.[2] All proposed findings and conclusions were considered and are incorporated as part of this decision or, if not incorporated, rejected as not in accord with the material issues of fact, law or discretion presented on the record. This decision upon becoming effective, reverses the Reconsidered Determination by the Executive Vice President for the reasons set forth in the following findings, conclusions and discussion, and directs that the marketing allocation be distributed in future crop years to all beet sugar processors on a pro rata basis.

The Parties and the issues

Petitioner, Amalgamated, has been joined in this appeal by two supporting Intervenors, Southern Minnesota Beet Sugar Cooperative L.L.C. ("SMBSC") and Wyoming Sugar Company ("Wyoming").

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[1] The Rules of Practice are attached as Addendum I.

[2] *See* the Rules of Practice, Addendum I, particularly, Rule 1(h), Rule 2(a)(b)(c)(d)(e) and (g), Rule 5(a), Rule 6, Rule 9 and Rule 10.

American Crystal has intervened in support of CCC. The Executive Vice President stated in his Reconsidered Determination that is the subject of this appeal, "...after careful reconsideration, I cannot find justification to overturn CCC's decision". (A.R. at 3). He based the decision on his interpretation of subparagraphs (E) and (F) of section 359d(b)(2) of the Act (7 U.S.C. §1359dd(b)(2)(E) and (F) that read:

> (E) PERMANENT TERMINATION OF OPERATIONS OF A PROCESSOR–If a processor of beet sugar has been dissolved, liquidated in a bankruptcy proceeding, or otherwise has permanently terminated operations (other than in conjunction with a sale or other disposition of the processor or the assets of the processor), the Secretary shall –
>
> (i) eliminate the allocation of the processor provided under this section; and
>
> (ii) distribute the allocation to other beet sugar processors on a pro rata basis.
>
> (F) SALE OF ALL ASSETS OF A PROCESSOR TO ANOTHER PROCESSOR – If a processor of beet sugar (or all of the assets of the processor) is sold to another processor of beet sugar, the Secretary shall transfer the allocation of the seller to the buyer unless the allocation has been distributed to other beet-processors under subparagraph (E).

The Reconsidered Determination stated (A.R. at 3):

> CCC determined that PNW was certainly not dissolved nor liquidated in a bankruptcy proceeding, but instead permanently terminated in conjunction with the sale of its assets. The act of permanent termination was simultaneous with the act of closing the deal on the sale of PNW's assets. The former event did not precede the latter. If CCC had determined PNW was permanently terminated for reasons other than in conjunction with the sale of its assets, paragraph E would have dictated the outcome. While the Statute does not define what it means to be 'permanently terminated', PNW was still recognized by CCC as a processor at the time of the sale, September 8, 2003.

As the beneficiary of CCC's decision, American Crystal has intervened to protect itself from losing the transferred Pacific Northwest marketing allocation. Petitioner and its two supporting intervenors seek the overturn of the CCC decision as beet sugar processors who shall share in the distribution of the marketing allocation under subparagraph E that controls when subparagraph F does not.

The Appeal Proceedings

Amalgamated filed its Petition on December 4, 2003. CCC filed an Answer, a Motion to Dismiss, and a Certified Copy of the Administrative Record on December 23, 2003. American Crystal filed a Notice of Intervention, Answer and Motion to Dismiss on January 14, 2204. Amalgamated filed a brief opposing the Motions to Dismiss on January 20,

2004. Both SMBSC and Wyoming filed Notices of Intervention on January 20, 2004. On March 2, 2004, Judge Jill S. Clifton who was then assigned to this case, held a telephone conference and set a schedule for the parties to follow in respect to a Motion for Summary Judgment American Crystal indicated it would file. On March 25, 2004, American Crystal filed a Memorandum in support of its Motion to Dismiss the Petition or in the Alternative for Summary Judgment. Also filed at that time, was an affidavit attesting to facts by American Crystal's Counsel, Steven Z. Kaplan. SMBSC filed its response to the Motions on May 3, 2004. American Crystal filed a reply to SMBSC' s response on May 21, 2004. This proceeding was reassigned to me, and on June 23, 2004, I issued an Order denying the Motions to Dismiss and the Motion for Summary Judgment.[3] On August 10, 2004, I conducted a teleconference with the parties scheduling dates for identifying witnesses and exhibits, holding an oral hearing and the filing of pre-hearing briefs.

Pre-hearing briefs were filed and the oral hearing was held on September 21-23 and on October 4 and 5, 2004 in Washington, DC. An amended certified copy of the Administrative Record respecting the Executive Vice President's Reconsidered Determination was filed and made part of the record at the outset of the hearing. Post-hearing briefing was completed on November 24, 2004. References to the transcript of the oral hearing are shown as "Tr." plus the day of the hearing and the page of that day's transcript, e.g., "Tr. Sept. 21 at 25". Exhibits of Amalgamated and SMBSC are cited as "AMAL–SM-____". American Crystal's Exhibits are cited as

[3] Copy of my Order is attached as Addendum 2.

"ASCS - _____". CCC's Administrative Record is cited as "A.R- _____". and CCC's amended Administrative Record is cited as "A.R. add ____".

Findings of Fact

1. The Columbia River Sugar Company ("CRSC") was formed as a cooperative in 1991, to build and operate a sugar beet processing factory in Moses Lake, Washington. Sugar beets had been previously grown in the Columbia River Basin but the processing plant located there had gone out of business and was inoperable.
2. CRSC formed the Pacific Northwest Sugar Company in partnership with the Holly Sugar Company ("Holly Sugar") to construct the factory, which took place in 1996 through the summer of 1998. (AMAL-SM 58 at 8).
3. In 1998, sugar beet processing was started at the Moses Lake factory under the direction of Holly Sugar whose personnel had experience gained from operating other factories. The Moses Lake operations did not go well. Equipment and system breakdowns caused frequent factory shutdowns for repairs and changes to the system. Approximately half of the sugar that went into its silos was unmarketable. The factory had a rate of recovery of sugar from the beets it processed of only 25% and two-thirds of the sugar beets delivered to the plant were not processed but instead rotted (AMAL-SM 58 at 8).
4. In 1999, Holly Sugar pulled out of the partnership conveying its interest in Pacific Northwest to CRSC. That year, Pacific Northwest operating the factory without assistance from Holly Sugar, hired a number of experienced employees to operate the factory.

Plant equipment was improved through the investment of several million dollars. The sugar recovery rate for the 1999 - 2000 processing season, increased from 25% to 65%. However, to be profitable, a sugar processing plant requires a recovery rate in excess of 80% with 90% being the optimum target (Tr. Sept. 22 at 52- 67; Tr. Oct 5 at 6- 10).

5. In the 2000-2001 processing season Pacific Northwest made additional improvements to its plant's operations and claimed to have again increased its sugar recovery to 82%. However, to reach 82%, the plant's chief operating officer had directed that residual molasses be recycled through its equipment; a practice that cost more in energy costs than the value of the additional sugar obtained (Tr. Oct. 5 at 10-11).
6. Operating a sugar beet processing plant is very expensive requiring large sums of capital. In 1999, Pacific Northwest owed $159-160 million to its principal lender and various creditors (AMAL-SM-58 at 8). In August of 1999, with strong congressional support, Pacific Northwest obtained a loan guarantee from the U.S. Department of Agriculture's Rural Development Business Guarantee loan project that enabled it to borrow $20 million to upgrade equipment, pay vendors and provide working capital. In December 2002, the U.S. Department of Agriculture, Office of the Inspector General Western Region, issued an audit report that reviewed the circumstances of the loan guarantee (AMAL-SM-58). The Department had guaranteed 70 percent or $14 million of the loan. In the spring of 2000, Pacific Northwest defaulted on the loan and the Rural Development was left

with an unpaid balance of $12.1 million after the proceeds from liquidation were applied to the loan. When the $20 million guaranteed loan was made, Pacific Northwest pledged as collateral the land, plant and equipment of the company that was initially valued at $162 million. The lender discounted the appraised value to a range of $40 million to $70 million in recognition of the limited opportunities to dispose of company assets and the lack of a production history (AMAL-SM-58 at 9). The lender also obtained a liquidation appraisal that disclosed that the collateral pledged by Pacific Northwest had a scrap value of $2 million and a forced liquidation value of $10 million. The Inspector General's Audit Report concluded:

> "By the spring of 2000, the Company's second attempt to establish the viability of the processing plant had failed. The failure was attributable to the borrower's poor financial condition and its inability to maintain sufficient resources to survive equipment failure and added production costs. The plant closed and the lender was force to liquidate the company's assets. In May 2001, the collateral was sold for $2.1 million. After the company paid liquidation costs, $1.9 million was applied against the guaranteed loan amount, leaving Rural Development obligated to pay the lender $12.1 million (AMAL-SM-58 at 9).

7. In August/September 2000, at the suggestion of Cobank which was Pacific Northwest's principal lender, Pacific Northwest retained Emmer Associates, Inc., an agricultural

financing and debt restructuring firm to work on its debt problems (Tr. Sept. 22 at 46-47). The Chief Executive Officer of Emmer Associates, Allan Lambrecht, personally worked on finding solutions for Pacific Northwest. In his opinion, Pacific Northwest had three principal needs: (1) the restructuring of its onerous debt; (2) a viable plant; and (3) a favorable price for the sugar the plant would produce (Tr. Sept. 22 at 61-62). At that time, the autumn of 2000, Pacific Northwest owed $159-160 Million to four lenders with Cobank being the principal lender (Tr. Sept 22 at 65-66). Efforts to restructure the debt did not go fast enough to maintain sugar beet planting commitments with growers and in March of 2001, Pacific Northwest released its growers from planting commitments. This decision was also based on the fact that the California energy crisis of 2000 — 2001 affected the Pacific Northwest and power companies paid both growers and the plant not to use power (Tr. Sept. 22 at 73). There was also a drought that year and since most of the sugar beets would have been grown on irrigated land, payments for water were avoided by not planting a sugar beet crop (Tr. Sept 22 at 74-75). In June of 2001, a restructuring arrangement was completed under which the plant was sold to a third party, Central Leasing, for $2.1 million. Pacific Northwest then leased the plant for the 2001-2002 processing season with a purchase option to buy back the plant in the 12-month period following June 2001 for the $2.1 million (Tr. Sept. 22 at 75-76). The lease payment was set at the rate of interest Central Leasing was paying for having borrowed the $2.1 million it paid for the plant (Tr. Sept. 22

at 80). Under the arrangement, the lenders allowed the plant to be sold free and clear of debts and liens by releasing their security so that title was transferred unencumbered to Central Leasing (Tr. Sept 22 at 78). The $2.1 million was paid to Cobank and the lenders who were owed some $159-160 million (Tr. Sept 22 at 79). By these means the old debt no longer needed to be serviced but new capital was needed for the plant to operate (Tr. Sept. 22 at 85-86). Everyone understood, in June 2001, that the old debt of $159-160 million less the $2.1 million paid against it would not be paid (Tr. Sept. 22 at 87). The debt would be carried on Pacific Northwest's balance sheet as unsecured debt but no payments on it would be made (Tr. Sept 22 at 87). A principal problem in securing new capital for the plant to operate after June 2001, was that two very substantial agricultural lenders had been taken down, dramatically, wherein they released their collateral and lost $160 million that they agreed they would not be able to recover. Normal commercial agricultural channels for borrowing money were therefore no longer available (Tr. Sept. 22 at 88).

8. On behalf of Pacific Northwest, Mr. Lambrecht attempted to secure capital for it to continue as a sugar beet processor from a variety of sources subsequent to the June 2001 arrangement with creditors and the sale and leaseback of the plant. Pacific Northwest and Mr. Lambrecht met or communicated with Global Ventures, General Mills, Cargill, American Federal Securities, Aegon Insurance Company, Oxbow Financial, Selby Financial, British Sugar, American Crystal, Michigan Sugar, MinnDak, Southern

Minnesota, and Amalgamated Sugar in an effort to find funding and, if possible, a partner to operate the Moses Lake plant (Tr. Sept. 22 at 90-106). None of these potential sources of capital resulted in necessary capital being obtained prior to the March 2002 deadline for obtaining sugar boot growing commitments for the 2002-2003 processing season (Tr. Sept. 22 at 108-109).

9. Sugar beet processing operations at the Moses Lake plant ceased in February 2001 and never resumed (Tr. Oct. 5 at 11). No sugar beet crop was planted by CRSC growers in 2002 or 2003 (Tr. Sept. 21 at 188).
10. On July 23, 2001, Pacific Northwest was administratively dissolved by the Secretary of State of the State of Washington for failure to file an annual license renewal application as required by Washington State law (ASCS-70). Pacific Northwest was not reinstated until September 8, 2003 when it filed necessary documents (ASCS-71).
11. After Pacific Northwest announced it would not have beets planted for the 2001 crop year, it laid off employees at the Moses Lake plant and reduced its workforce to less than 40 people (Tr. Oct. 5 at 12). The plant when fully operational on October 19, 2000, had employed 290 people (AMAL-SM-22 at 3).
12. In December 2001, Pacific Northwest forfeited 91 million pounds of sugar to the CCC and the sugar was then sold on the market to Amalgamated and another bidder. When Amalgamated finally obtained access to the plant site in April 2002 to take the sugar, there were no people working there. Indemnity agreements and arrangements for cutting open the expensive tanks where the

sugar was stored were made exclusively with Central Leasing with no participation by Pacific Northwest (Tr. Oct. 5 at 42-58). Central Leasing accepted a monetary payment in lieu of actual repairs to the tanks and the tanks were not repaired (Tr. Oct. 5 at 59-60).

13. At the end of March 2002, Pacific Northwest's lease arrangement for the Moses Lake plant ended after having failed to pay the agreed rent, and the lease was not renewed (Tr. Sept. 22 at 115).
14. In May of 2002, the 2002 Farm Bill was signed and Pacific Northwest subsequently received a sugar beet marketing allocation of 2.7% of the future allotments under the Act, on the basis of its production record for 1998, 1999 and 2000.
15. In July of 2002, a daylong meeting was held in Spokane, Washington at the law offices of Pacific Northwest's attorneys that included Mr. Lambrecht, representatives of Central Leasing, all five of Pacific Northwest's Board of Directors, a Cargill representative who attended by telephone and a representative for Oxbow Capital and Selby Financial (Tr. Sept. 22 at 119-121). Pacific Northwest's Board of Directors made it clear "they were really done spending money, and would pay no further bills from financial consultants or attorneys (Tr. Sept 22 at 123). In fact, Mr. Lambrecht had not been paid by Pacific Northwest since January 2002 (Tr. Sept 22 at 123).
16. It was decided at the July 2002 meeting that a new entity, Washington Sugar Company, LLC ("Washington Sugar") would replace Pacific Northwest so that Pacific Northwest would not incur any mote debts or obligations in respect to

any activity to revive sugar beet processing operations at the Moses Lake plant (Tr. Sept. 22 at 125). Washington Sugar was a different company in terms of its ownership base from Pacific Northwest. The only owner of Washington Sugar was Scott Lybbert who was but one of the five directors of Pacific Northwest that was a wholly owned subsidiary of CRSC (Tr. Sept. 22 at 129). CRSC had no interest in Washington Sugar (Tr. Sept. 22 at 130).

17. A year after its June 2001 purchase of the Moses Lake plant, Central Leasing's leaseback/purchase option agreement with Pacific Northwest ended, and Central Leasing started to dispose of the plant's equipment and sought other ways to recover its investment. In July 2002, it leased two beet piers to Amalgamated and in December 2002, Amalgamated brought the pilers from Central Leasing for $215,000 (Tr. Oct. 5 at 63; AMAL-SM-57). On June 10, 2003, Central Leasing sold the three remaining piers of the Moses Lake plant to Amalgamated for $700,000 (Tr. Oct. 5 at 63; AMAL-SM 59). To avoid frost damage to beets during the short harvest opportunity window in Moses Lake, beet pilers are required for beets to be received, cleaned and piled for long-term storage so the factory can operate for a longer period of time (Tr. Oct. 5 at 64-65). On April 16, 2004, Central Leasing sold to Crab Creek Sugar Company centrifuges, conveyors, filters, pumps and other sugar beet processing equipment identified in a Bill of Sale of that date (ASCS-94). By early 2002, the computer system that allowed the Moses Lake plant to be operated as an automated factory was no longer available

(Tr. Oct 5 at 14-16).

18. In July 2002, Pacific Northwest lost its short-term lease on the Moses Lake facility for failure to pay rent and no longer had a purchase option for the plant in place (Tr. Sept 23 at 6). Pacific Northwest owned no sugar beet processing equipment and had been unable to attract any new financing. At that point, the Board of Directors of Pacific Northwest informed their lawyers and consultants that they "were really done spending money" and that "they were not ready to stand on the line and incur any more debt or obligations for the people pursuing" further efforts to revive the Moses Lake plant (Tr. Sept. 22 at 122 and 125).
19. The former vice-president of Pacific Northwest and a CRSC member, Scott Lybbert, formed a new company, Washington Sugar, to pursue the revival of sugar beet processing at the Moses Lake plant. On December 3, 2002, the CRSC Board Passed a resolution to transfer its marketing allocation to Washington Sugar and in support of Washington Sugar's efforts to reopen the Moses Lake plant (ASCS - 66 at 2). The resolution made it clear that Pacific Northwest had permanently terminated its operations at the Moses Lake plant:

    > CRSC is the sole member of Pacific Northwest Sugar Company, LLC ("PNSC"); and...CRSC has no desire, interest or ability to move forward and operate PNSC processing facility (A.R. add at 95).

20. On September 24, 2002, Scott Lybbert, as President of Washington Sugar Company, wrote to CCC asking that Pacific Northwest's beet

sugar marketing allocation be transferred to Washington Sugar (A.R. add at 2). On October 3, 2002, he wrote a second letter making the same request (A.R. add at 3).

21. On October 11, 2002, CCC advised Mr. Lybert, pursuant to 7 C.F.R. §1435.308(d) that covers purchasing processors who are new entrants, CCC would transfer Pacific Northwest's allocation to Washington Sugar Company "upon receipt of a copy of the bill of sale showing that virtually all of the assets or Pacific Northwest, including the factory, have been acquired by the Washington Sugar Company (A.R. add at 4).
22. At approximately the same time, Amalgamated, by its President, Ralph Burton, also asked CCC about acquiring Pacific Northwest's allocation. Amalgamated was told that it would be entitled to the allocation "(i)f Amalgamated purchased virtually all of the assets of Pacific Northwest Washington, including the factory" (A.R. add at 6, Tr. Oct. 4 at 134- 137).
23. CCC redistributed virtually all of Pacific Norwest's marketing allocation to other processors in crop year 2002. Although CCC provided Pacific Northwest with an initial marketing allocation for crop year 2002, CCC was legally empowered to redistribute any allocation that wasn't being used. On October 1, 2002, when CCC announced initial allocations under the provisions of the 2002 Farm Bill, it immediately and simultaneously redistributed 87% (97,639 of 112,639 short tons) of Pacific Northwest's allocation to other processors (AMAL-SM-78). During the remainder of that same crop year, CCC subsequently redistributed an additional 24,023 short tons — nearly all the

rest of Pacific Northwest's initial allocation, as well as any additional allocation that Pacific Northwest might have received because of increases in the beet sugar total allotment — to other sugar beet processors. As of September 25, 2003, Pacific Northwest's remaining balance was only 381 short tons or .008% of the overall beet sugar allotment (Tr. Oct 4 at 149-154; AMAL-SM-78).

24. Even though Pacific Northwest never used any of its sugar beet marketing allocation; it sought to have the allocation increased for crop year 2003. A hearing on the application was held on June 16, 2003, at which CCC's Executive Vice President presided. CCC was informed at the hearing through the testimony of various witnesses that Pacific Northwest had apparently terminated operations and was unlikely to operate in the future. Ralph C. Burton, President and CEO of Amalgamated, testified (AMAL-SM-61 at 2; Tr. Oct 4 at 146-147):

> "...a crop has not been grown and the factory has not processed sugar beets for at least two years...."

Perry Meuleman, President of the Idaho Sugarbeet Growers Association, testified (AMAL-SM-61 at 3):

> It is my understanding that Pacific Northwest has not planted sugarbeets for at least two years – and 2004 is suspect. They do not control the factory assets. In fact, the owner of the factory assets has recently agreed to sell three of their beet pliers to the Amalgamated Sugar Company. Pilers are a critical component of a successful beet operation...

James Horvath. President and CEO of American Crystal testified (AMAL-SM-61 at 5):

> Pacific Northwest has not processed sugarbeets of the 2001 and 2002 crops, and it is our understanding that no sugarbeets have been planted for the 2003 crop. Therefore, it is a real question as to whether it will be able to continue in operation in 2003...

The Sugarbeet Processors group, which included virtually every sugar beet processor other than Pacific Northwest, submitted virtually identical testimony (AMAL-SM-61 at 7). Finally, the Sugarbeet Growers group informed CCC that based on Pacific Northwest's unsuccessful history, the fact that it was saddled with old mismatched equipment, its failure to process sugar beets during the 2001 and 2002 crop years, and that all but a minimal amount of PNSC's allocation had to be reallocated to other processors (ANAL-SM-61-at 23-24).

> ...there has to be a real question in any reasonable person's mind as to whether this company can ever rise from the ashes to become an operational processor again.

25. The all-day meeting held in Spokane, Washington in July 2002, marked the end of any meaningful involvement by Pacific Northwest with the sugar beet processing plant it had sold to Central Leasing. From that point on, all arrangements, deals and overtures respecting the beet sugar marketing allocation CCC had conferred upon Pacific Northwest were undertaken by Scott Lybbert for his company Washington Sugar, with some assistance from Central Leasing. Neither entity had ever been recognized by CCC as having any independent

right or entitlement to the allocation. Although various industry members were interested in acquiring the allocation, they appear to have been either misled or kept in the dark about the status of those who would sell it. There were also different objectives being pursued by Lybbert/Washington Sugar and Central Leasing. When Joseph Talley, Vice-President of Finance and Chief Financial Officer of American Crystal met with Scott Lybert, and Allan Lambrecht on January 30, 2003, Mr. Talley prepared notes on their conversation (Tr. Sept. 21 at 170; ASCS-26). Mr. Talley's notes and his confirming testimony show that he was advised that Washington Sugar was 100 per cent owned by Scott Lybbert and that there was an agreement with USDA that Washington Sugar had the rights to whatever marketing allocation Pacific Northwest had (Tr. Sept. 21 at 219-220, ASCS-26 at 4). There were stumbling blocks to reviving operations at the Moses Lake plant that Mr. Talley duly noted. Growers were still owed $8 million and their lawsuit against USDA (CCC Sugar) and Pacific Northwest was on appeal. USDA had hinted that if no crop was planted by May, the 15,000 tons of 2003 allocation would go away, and for the future it seemed like Pacific Northwest's allocation would go away permanently (Tr. Sept 21 at 220, ASCS-26 at 4). As for participation by Central Leasing:

> "Pacific Rim Ethanol is working with Central Leasing to convert the plant to an ethanol facility. Central Leasing would contribute the plant assets as equity to the ethanol company. Project would process

barley and wheat into ethanol, and also to vital wheat gluten.

... Central Leasing does not appear to be willing to part with the plant today. Scott L. doesn't know how long this idea will live on.

... Does Central Leasing understand that if the marketing allocation goes away the plant has no value as a sugar processing plant? (ASCS-26 at 4-5)

Mr. Talley's notes and testimony also disclosed that Central Leasing offered to lease the plant to Washington Sugar but it would not include the assets that Pacific Rim might want (boilers, gas system, etc....value of $10 million) (Tr. Sept. 21 at 220-2, ASCS-26 at 5).

26. Central Leasing bought Pacific Northwest's plant and equipment but never sought to acquire the allocation and was unwilling to directly use the plant for sugar processing. Scott Lybbert was a former director of Pacific Northwest who was interested in reviving the plant's operations through his company, Washington Sugar, but CCC so conditioned the transfer of the allocation to Washington Sugar that he was unable to go forward. There then came a time when Mr. Lybbert and Central Leasing decided to recoup financial losses. Both would share in the payment American Crystal was offering for a successful transfer of the allocation to cover American Crystal's processing operations at plants located outside the State of Washington and not at Moses Lake.

27. American Crystal's proposal was described in a July 3, 2003, fax by Joseph Talley of American Crystal to Barbara Fesco, a CCC sugar program

official (A.R. add at 89-90):

> "First, our understanding is that Pacific Northwest Sugar Company (PSNC) currently holds an allocation to sell sugar. The allocation was initially established as a result of the Farm Security and Rural Investment Act of 2002 (Farm Bill). Since that time Pacific Northwest Sugar Company's allocation has not been permanently transferred from them nor terminated, but it has been reassigned (with such reassignment being valid only through the current fiscal year).
>
> American Crystal Sugar Company (ACSC) is currently contemplating a transaction, which would effectively result in the allocation, currently owned by PNSC, being transferred to ACSC. As currently contemplated, substantially all of the assets of PNSC would be transferred to an intermediary company (Washington Sugar Company (WSC). Since PNSC has already transferred ownership of its former processing facility to another (Central Leasing LLC), substantially all of the assets of PNSC consist mainly of the marketing allocation and some other generally immaterial assets. The next step in the transaction would be the immediate transfer of substantially all of the assets of WSC to ACSC (or perhaps a 100% owned subsidiary of ACSC). The effect of the transaction would be to move the sugar marketing allocation from PNSC, through WSC to ACSC.
>
> ACSC does not intend to process sugar beets

in Moses Lake, WA after the completion of the transaction (emphasis added).

28. On July 30, 2003, American Crystal's President James J. Horvath and Scott Lybbert for Washington Sugar, sent CCC a fax that formally notified CCC of American Crystal's intent to "acquire ownership or control of the assets (including the rights to the production history and marketing allocations) associated with the Moses Lake Washington sugar beet process factory." They requested, "USDA's preliminary approval of these transactions as they related to the transfer of marketing allocation currently held by the Pacific Northwest Sugar Company, LLC to ACSC." CCC was again told that American Crystal had no intention of ever operating the Moses Lake facility (A.R. add at 92-93)

29. CCC replied on August 28, 2003 (A.R. add at 234-235:

> We understand that American Crystal is purchasing all of the assets of Pacific Northwest, securing the rights to make sugar at the Pacific Northwest/Central Leasing factory site, and purchasing some of the sugar making equipment used by Pacific Northwest (emphasis added).

In contrast to previous responses to Washington Sugar and Amalgamated that CCC would require the purchase of virtually all of Pacific Northwest's assets, including the factory, American Crystal was advised that the transfer of Pacific Northwest's allocations would be effectuated upon receipt of documentation showing "that American Crystal has purchased

some equipment (including the diffuser and the molasses desugaring equipment) from Central Leasing that Pacific Northwest used to make sugar" (emphasis added). (AMAL-SM-67; AR. add at 234-235).

30. The letter from CCC of August 28, 2003 (A.R. add at 234-235), advised Mr. Lybbert of Washington Sugar and Mr. Horvath of American Crystal, that CCC would transfer Pacific Northwest's marketing allocation to American Crystal if provided with documentation showing;

    • ...all of the assets of Pacific Northwest have been purchased by American Crystal, that American Crystal has secured the rights to make sugar at the Pacific Northwest/Central Leasing facility, and that American Crystal has purchased some equipment (including the diffuser and the molasses desugaring equipment from Central Leasing that Pacific Northwest used to make sugar.

    • Certification from Pacific Northwest that it has not marketed any sugar under its 2002 – crop sugar marketing allocation, if American Crystal wishes CCC to transfer the Pacific Northwest's 2002 – crop allocation to American Crystal.

    • American Crystal and Pacific Northwest must each agree in writing to waive their respective rights, if any, to bring an action against the Secretary of Agriculture, USDA and any agency thereof including CCC, and any official of the Department, in the event USDA is required by a Court to reverse the transfer of the allocation to American Crystal as a result of legal action by a third party

challenging the original transfer from Pacific Northwest to American Crystal.

- American Crystal must agree in writing to drop Pacific Northwest's appeal of CCC's adverse decision regarding its request for an increased allocation because Pacific Northwest suffered a quality loss on stored beets and built a desugaring facility.

31. On September 8, 2003, American Crystal advised CCC that through its wholly-owned subsidiary, Crab Creek Sugar Company, it acquired that day, "...ownership or control of all of the assets (including the rights to the production history and the marketing allocations) associated with the production of sugar at the Moses Lake, Washington sugarbeet processing factory..." (AMAL-SM-70 at 1). The letter went on to positively address the requirements for the transfer CCC specified in its August 28th letter (A.R. add at 243-244). A Bill of Sale was attached (A.R. add at 245-247). However, an "Appendix A" referred to in the Bill of Sale from Central Leasing was not part of the materials produced in evidence and there is nothing indicating that the diffuser and molasses desugaring equipment was actually acquired by American Crystal (A.R. add at 248-249, ASCS 67 at 64-65).
32. On September 16, 2003, CCC wrote to Scott Lybbert as Vice-President Finance and Marketing, Pacific Northwest Sugar Company, to inform him that effective immediately, it was transferring Pacific Northwest's marketing allocation to American Crystal (A.R. add at 250).
33. American Crystal paid $6.8 million to acquire Pacific Northwest's marketing allocation. The

following payments were made from an escrow account (ASCS 67 at 31-36, Tr. Sept. 21 at 137-139):

Central Leasing	$2,125,000.00
Scott Lybbert	$ 300,000.00
Pacific Northwest	$3,025,000.00

The $300,000.00 paid from the escrow account to Scott Lybbert was designed to be an initial payment on a "non-compete" agreement with the balance to be paid him over a so-called "earn out" period of time, for $1.65 million, total, going to him (Tr. Sept. 21 at 138-139).

34. After acquiring the allocation American Crystal realized it could not fully use all of it (Tr. Sept. 21 at 155-156). American Crystal contacted other beet sugar processors and leased them portions of American Crystal's allocation for undisclosed sums (Tr. Sept. 21 at 159-166; ASCS 85-94). The other processors who leased portions of American Crystal's marketing allocation were Michigan Sugar and Minn-Dak and because of confidentiality agreements American Crystal has with each of them, I did not compel American Crystal to reveal the amounts it has received under the lease arrangements (Tr. Oct. 5 at 121-124).

35. On July 1, 2004, CCC added a regulatory provision dealing with permanently terminated sugar processor operations (7 C.F.R. §1435.308(b)):

> ...CCC will permanently eliminate the processor's remaining allocation and distribute it to all the other processors on a pro-rata basis when the processor:

(1) Has been dissolved,

(2) Has been liquidated in a bankruptcy proceeding, or

(3) Has permanently terminated operations by:

(i) Not processing sugarcane or sugar beets for 2 consecutive years, or

(ii) Notifying CCC that processor has permanently terminated operations.

Conclusions of Law

1. **The Act has conferred subject matter jurisdiction upon Administrative Law Judges to hear and decide appeals of this kind.**
2. **Petitioner has stated a legally cognizable claim.**
3. **The doctrine of judicial estoppel is unwarranted and inappropriate in this case.**
4. **The Reconsidered Determination by the Executive Vice President of the Commodity Credit Corporation that implemented the permanent transfer of Pacific Northwest's marketing allocation exclusively to American Crystal instead of distributing it pro-rata to all beet sugar processors, is unsupported by the evidence of record and is inconsistent with the Act's requirements.**

Discussion

The first three conclusions deal with procedural issues that are discussed in the Order of June 23, 2004, attached as Addendum 2. The

discussion that follows is concerned with the merits of the appeal that is the subject of the fourth conclusion.

Chief Judge Marc R. Hillson recently reviewed the history underlying the 2002 Farm Bill:

> The federal government regulated sugar beets, along with other commodities, for many years. The degree of regulation has varied widely over time, based on a variety of circumstances. Thus, in 1996, Congress enacted the Agriculture' Marketing Transition Act, P.L. 104-127, also known as the "Freedom to Farm Act"; which removed the previous sugar marketing allotments that had limited the sale of beet sugar, and other commodities. Then, in 2002, Congress largely reversed itself by passing the Farm Security and Rural Investment Act, 7 U.S.C. § 1359 et seq. This Act required the Secretary to once again establish allotments for the processing of beet sugar, based on the average weighted quantity of beet sugar produced by a given processor during 1998 to 2000 crop years.... *In re: Southern Minnesota Beet Sugar Cooperative*, SMA Docket No. 03-0001, slip opinion, July 21, 2004, at 3.

The Act as amended in 2002, requires the Secretary of Agriculture to estimate the amount of sugar to be consumed in the United States each crop year from 2002 through 2007, and after estimating the amount of permissible imports and desirable carryover stocks of sugar, to establish allotments for the crop year that divides the marketable balance

between domestic processors of sugar beets and sugarcane (7 U.S.C. §1359bb). Sugar beet processors receive allocations of their crop year allotment based on their production histories during the 1998 to 2000 crop years (7 U.S.C. §1359(dd)(b)(2)). Any increase in a given processor's allocation requires an offsetting decrease in the allocations of other processors so that the overall allotment remains unchanged for what industry members call "a zero sum game."

The pertinent legislative history of the 2002 amendatory provisions that restored beet sugar allotments, consists of short, introductory remarks by their cosponsor, Senator Conrad of North Dakota (AMAL-SM-83; Vol.148, No. 10 of the Congressional Record, Feb. 8, 2002 at S 513-S 514). Senator Conrad stated that the provisions reflected producers' efforts to forge a consensus on a method for establishing allotments that is fair and open and provides some certainty and predictability to the industry. After reviewing the methodology for establishing future allotments, Senator Conrad stated that:

> ...the formula allows for adjustments in the reallocation of beet sugar allotments to account for such industry events as the permanent termination of operations by a processor, the sale of a processor's assets to another processor, the entry of a new processor, and so on.
>
> Taken together, these provisions offer the predictability, fairness, and transparency we all agree is much needed in the sugar beet industry.

These stated intentions that reallocations be event driven and that actions by the Secretary should be predictable, fair and transparent were not

adequately met by CCC's actions in this case. Moreover, CCC's actions conflict with the plain and straightforward language of the Act.

CCC, acting for the Secretary, is to transfer the allocation of allotment held by a sugar beet processor to another processor when the buying processor has either bought the selling processor itself or "all of the assets of the processor."

Other than when such a sale has taken place, the allocation of a processor whose operations have permanently terminated is to be eliminated by CCC and an equivalent allocation is to be made to the other beet sugar processors on pro rata basis. See 7 U.S.C. §1359dd (b)(2)(E) and (F).

When a processor requests the transfer of another processor's allocation of allotments, CCC is required to make three determinations before granting the transfer request.

1. Both parties to the transfer must be processors.

Unquestionably, American Crystal is a sugar beet processor. But Pacific Northwest did not fit the regulatory definition at the time of the transfer request. The following definition was published on August 26, 2002 (67 FR 54928; 7 C.F.R. §1435.2):

> Sugar beet processor means a person who commercially produces sugar, directly or indirectly, from sugar beets (including sugar produced from sugar beet molasses), has a viable processing facility, and a supply of sugar beets for the applicable allotment year.

Earlier, 7 C.F.R. §1435.2 states:

The definitions, set forth in this section are

applicable for purposes of program administration.

Despite this admonition of the regulation, a failing processor needs time to wind down operations before selling its company or all of its assets. Strict application of the definition in those circumstances would thwart the Act's objective that CCC is to transfer the marketing allocation of a processor that may be failing but has not as yet been dissolved, liquidated in bankruptcy, or has not otherwise permanently terminated its operations. This conflict between an objective of the Act and an implementing regulation requires an exception to the regulation to allow the transfer of a marketing allocation held by a failing but not totally failed, processor as the Act intends. Therefore, even though Pacific Northwest no longer had either a viable processing facility or a supply of current beets, it still was entitled to be treated as a "processor" for the purposes of administering subparagraph (F) of section 359d(b)(2) of the Act.

2. **The seller the allocation has not been dissolved, liquidated in a bankruptcy proceeding, or otherwise has not permanently terminated operations (other than in conjunction with a sale or other disposition of the processor or the assets of the processor).**

CCC and American Crystal both argue that Pacific Northwest had not permanently terminated operations before selling its allocation to American Crystal.

American Crystal urges that even though Pacific Northwest previously sold its plant and

equipment to Central Leasing, had lost the lease and its option to buy back the plant for failure to pay rent, and had not contracted for a supply of sugar beets for three years, it still had not permanently terminated operations at the time of sale. American Crystal asserts three bases for its argument. First, it argues that the attempts by other industry members to acquire the allocation indicates the industry did not believe a transfer was foreclosed because Pacific Northwest 's operation had permanently terminated. Second, a temporary shut-down of operations is not the same thing as a permanent termination and nothing about Pacific Northwest's conduct was consistent with a company that had given up (American Crystal's brief, at 23). Third, it joins with CCC in arguing that a determination of whether a permanent termination of operations has taken place is a wholly discretionary matter left to CCC's judgment.

The fact that others sought the transfer of Pacific Northwest's marketing allocation is of no legal consequence. They made incorrect assumptions based on misleading and incomplete information (*See* Finding of Fact 24).

The argument that the plant's shut-down was only temporary and Pacific Northwest had not given up hope is completely refuted by the evidence of record. Hope was definitely gone. American Crystal's own witness, Allan Lambrecht, testified that Pacific Northwest's Board of Directors in a July 2 "summit meeting," instructed all in attendance that "they were really done spending money" and would incur no financial obligations to revive sugar beet processing at the Moses Lake plant (*See* Findings of Fact 15 and 16).

The record evidence makes it abundantly clear

that at the time American Crystal undertook to buy the marketing allocation, Pacific Northwest had long ceased to have the ability to process sugar beets. Its factory and equipment had been sold more than two years earlier to Central Leasing. Although when it sold the plant and equipment, it obtained a lease with a purchase option, Pacific Northwest failed to pay the agreed rent and any right to process sugar beets at the plant ended in March 2002. Sugar beet processing operations ceased in February 2001 and never resumed. No sugar beet crop was planted for processing by Pacific Northwest in 2001, 2002, or 2003. On July 23, 2001, the State of Washington administratively dissolved Pacific Northwest for failure to file its requisite annual license renewal application. At the daylong "summit meeting", held in July 2002, the Directors of Pacific Northwest told their lawyers their financial advisors and everyone else in attendance, they would no longer pay anyone for advice and assistance on how to revive the plant's operations. In no uncertain terms, the Board of Directors told everyone that Pacific Northwest would never again attempt to operate the plant to process sugarbeets (Tr. Sept 22, at 119-132).

American Crystal's third and final argument, and CCC's only one, is that even in light of these facts, a beet sugar processor cannot be said to have permanently terminated its operations until CCC says so. However, the Act requires CCC to make the determination when the facts are such that there has been a permanent termination of operations other than in conjunction with a sale of the processor or all of the processor's assets. Senator Conrad's statement of Feb 8, 2002, explained that the reallocation of all allotments are to be based on industry events. When such events occur, action by CCC is mandated by the

plain language of the Act and CCC's discretion in making reallocations is circumscribed.

On July 1, 2004, subsequent to granting this transfer, CCC amended its regulations to add a provision respecting permanent termination of operations 7 C.F.R. §1435.308(b) was amended to read (69 Fed. Reg. 39811, 39813 (July 1, 2004)):

> ...CCC will permanently eliminate the processor's remaining allocation and distribute it to all other processors on a pro-rate basis when the processor:
>
> (1) Has been dissolved,
>
> (2) Has been liquidated in a bankruptcy proceeding, or
>
> (3) Has permanently terminated operations by:
>
> (i) Not processing sugarcane or sugarbeets for 2 consecutive years, or
>
> (ii) Notify CCC that processor has permanently terminated operations.

But even if this regulation had been in effect, the parties do not agree on the meaning of "2 consecutive years". American Crystal and CCC argue that the regulation means two consecutive crop years and Pacific Northwest cannot be said to have ceased operations for that long in that the 2002-2003 crop year didn't end on September 30, 2003. Conversely, Petitioner argues that since "crop year" was not the term used in this provision while it was plainly stated elsewhere in the Act and the regulations, the word "year" should be given its ordinary meaning denoting a twelve-month time period. Under this interpretation, because Pacific Northwest ceased operations in February of 2001, two consecutive years

had indeed passed by the time the transfer was approved on September 16, 2003. I agree with Petitioner that the specific use of "crop year" in other sections of the sugar regulations as well as within subsection 1435.308 itself while not used in subsection 1435.308(b)(i), is subject to the rule of construction that the disparity is intentional and purposeful. *See Barnhardt v. Sigmon Coal, Co., Inc., et al*, 534 U.S.C. 438, 452 (2002); and *Russello v. U.S.*, 464 U.S. 16, 23 (1983). Petitioner next urges that we look to the new regulation for guidance. My problem with this approach is that the new regulation fails to clarify why two years of inactivity results in a presumption that a termination of operations is permanent. The amended regulation was issued as a final rule without notice and comment. It may well be that CCC issued the regulation for purposes of administrative convenience rather than as a reflection of industry practices. But there really is no need to apply the regulation retroactively.

Pacific Northwest's decision to stay completely shut down and no longer be a processor seeking to reopen, was clearly established by the pronouncement of its Board of Directors at the "summit meeting" in July 2002. The evidence of record in the proceeding clearly demonstrates that Pacific Northwest permanently terminated operations prior to and not due to selling its rights to its marketing allocation.

3. **There must be a sale of a processor of beet sugar or all of the assets of the processor.**

The Act is very specific. There must be a sale of the processor, or all of the assets of the processor for its allocation to be transferred.

Pacific Northwest itself was not sold. The

assets that it still owned at the time of the sale, consisted of its right to the allocation and what a spokesman for American Crystal described to CCC as "immaterial assets". These immaterial assets were "goodwill", production rights, production history and books and records listing growers and customers. Without a plant, equipment or sugar beets, Pacific Northwest's production rights had become inoperative. The production history that had been used to obtain Pacific Northwest's marketing allocation had no further value. No purchasing processor needed a list of growers who hadn't planted sugar beets for over three years. Nor was there any real value in learning who had once bought sugar from Pacific Northwest The obvious concern of a processor acquiring additional marketing allocation is the ability to meet its own customer demands and not how it might increase them.

American Crystal points out in its brief (American Crystal brief at 16) that it also bought equipment from Central Leasing to meet conditions imposed by CCC for approving the transfer. Inasmuch as the equipment was once owned by Pacific Northwest, American Crystal seems to suggest that this secondhand acquisition helped it meet the Act's requirement that a qualifying sale include "all of the assets of the processor". However, CCC in its brief (CCC brief at 11), clarifies that it required American Crystal to acquire these other assets because of its concern that if others acquired control of them they might in the future request allocation as a new entrant or because they had acquired and reopened the factory for sugar beet production. Such a claim for allocation could be made under 7 U.S.C. §1359dd(b)(2)(H), and CCC feared there could be a double counting of Pacific

Northwest's former allocation.

In sum, the only assets American Crystal bought that were still owned by Pacific Northwest were its rights to the marketing allocation and what its spokesman aptly described to CCC as "some other generally immaterial assets".

The Act does not treat a marketing allocation as an asset that a processor can simply buy and sell. CCC can change a processor's allocation if it sells a factory or if a new sugar beet processor enters into the industry, reopens a factory, or acquires an operating factory with a production history. See 7 U.S.C. §§1359dd(b)(2)(G), (H) and (I). Allocations can be changed during a crop year (AMAL-SM-78). CCC is empowered by the Act to transfer or temporarily reassign part of a processor's allocation when there is a shortfall in the processor's production that another processor can make up 7 U.S.C. §1359 ee. A sugar beet processor's allocation is further subject to the requirement that allocations "be shared among producers served by the processors in a fair and equitable manner" 7 U.S.C. §1359 ff. When a sugar beet processor closes a factory, the growers who were delivering beets to the closed factory can elect to deliver their crops to another processor and request CCC to transfer allocation commensurate with the growers' production history to their new processor 7 U.S.C. §1435.308(a). The Secretary of Agriculture is not required to compensate a processor who loses allocation in any of these circumstances or first seek the processor's permission. A marketing allocation is not, therefore, an asset that can be transferred without the concurrence of USDA. For there to be a "sale of all assets", more than the marketing allocation itself needs to be conveyed.

CCC apparently recognized this fact when

prior applications to transfer Pacific Northwest's allocation were received from others. Scott Lybbert, the sole owner of Washington Sugar, the would-be successor to Pacific Northwest, sought to obtain it and was advised he would have to provide a "...bill of sale showing that virtually all of the assets of Pacific Northwest including the factory, have been acquired by the Washington Sugar Company" (Finding of Fact 20 and A.R. add at 4). CCC explains that as a new entrant the requirements for Washington Sugar were different. But they were also set differently for petitioner, Amalgamated, an established processor, when it too was advised that the transfer would only be authorized "...if Amalgamated purchases virtually all of the assets of PNW including the factory..." (Finding of Fact 21; A.R. add at 6; Tr. Oct. 4 at 134-137). These communications took place in the fall of 2002. What transpired in the year that followed that altered CCC's interpretation of the controlling provisions is unexplained.

In any event, CCC did impose different requirements for its approval of the allocation's transfer to American Crystal.

The fact that it imposed any conditions at all for its approval of the transfer is inconsistent with the argument that the language of the Act left it no choice but to give its approval.

Both CCC and American Crystal assert that subparagraph (F) required the allocation's transfer just because it had not been previously distributed to other sugar beet processors under subparagraph (E). If subparagraph (F) is read this simplistically, things of no real worth, such as pencils and paper clips could be the only assets sold with a marketing allocation, and CCC would have to approve the transfer. This would be an absurd result. CCC must evaluate the

transfer and place such conditions on its approval as may be needed to effectuate the objectives of the Act. CCC did find it necessary to condition its approval of the transfer.

Inasmuch as the plant and processing equipment was owned by Central Leasing and not by Pacific Northwest, "...CCC wanted to insure that if it transferred the Pacific Northwest allocation to American Crystal, another entity would not come along and, on the basis of other assets relating to the beet sugar processing operation of Pacific Northwest, apply for an allocation" (CCC's brief, at 11). CCC did so by requiring American Crystal to acquire equipment no longer owned by Pacific Northwest. CCC, therefore, did condition its approval even though it now argues that subparagraph (F) left it without discretion to withhold approval.

The Reconsidered Determination by the Executive Vice President of CCC, that is the subject of this appeal, also recognized that for a transfer to be approved under subparagraph (F) the sale of the processor's assets must be the cause of the processor's permanent termination of operations. For an act to be the proximate cause of a consequence, as is so often stated in Tort law, the consequence would not have occurred but for the act.

Here, it cannot be said but for the sale of the assets still owned by Pacific Northwest when its allocation was transferred to American Crystal, Pacific Northwest would still have been able to process sugar beets. "Good will", production history, inoperative production rights, and books and record of past dealings would not have been enough. Pacific Northwest needed ownership or control of a factory and equipment to once again process sugar beets into sugar. It sold or lost those assets long before this

transaction. The permanent termination of its operations was not proximately caused by its sale of these immaterial assets and they were not sufficient to meet the statutory requirements for a transfer to be approved.

Additional Comments, Findings and Conclusions

The language of the Act, as supported by underlying legislative history, places restrictions on the sale of sugar beet marketing allocations by one processor to another.

CCC is to transfer the allocations of allotments by a processor of beet sugar to another processor when the buying processor has either bought the selling processor itself or "all of the assets of the processor".

Other than when such a sale has taken place, the allocation of a processor whose operations have permanently terminated is to be eliminated by CCC, and a pro rata distribution of an equivalent allocation is to be made by CCC to the other beet sugar processors. See 7 US.C. §1359dd(b)(2)(E) and (F).

The record in this case makes it abundantly clear that when the sale to American Crystal took place, Pacific Northwest was no longer able to ever again process beets into sugar. It had neither the physical assets or the will. Actually, under the laws of the State of Washington it was dissolved as an entity although it was later reactivated for the sole purpose of signing the transfer papers.

Setting aside for a moment its sale of its plant and the subsequent loss of its lease and the fact it had no sugar beets under contract for processing, the Board of Directors of Pacific Northwest made it clear that it would never again attempt to operate the

plant to process sugar beets (Tr. Sept 22, at 119-132).

That was a signal event. Despite the fact that others may still have had hopes to restart operations, Pacific Northwest did not. Central Leasing, the plant's owner, was actively attempting to convert the plant for ethanol production (Tr. Sept. 22, at 133) and sold off equipment needed to operate it for sugar beet processing (Tr. Oct 5, at 63-65).

One man, Scott Lybbert, a director of Pacific Northwest, did want to resume operations at the plant, but for his own company, Washington Sugar, and not for Pacific Northwest. To do so, Washington Sugar had to obtain needed financing, the use of the plant and Pacific Northwest's marketing allocation. It was unable to obtain any of them. Its overtures to CCC seeking the transfer of the marketing allocation were thwarted by CCC's requirement that Washington Sugar had to first acquire the factory. By then, Central Leasing had other potential uses for the plant and Washington Sugar could not meet this requirement. The financing source Mr. Lybbert had turned to for needed capital to start the plant, was American Crystal. But American Crystal, upon investigation of the situation at Moses Lake decided that financing the revival of beet sugar processing operation at the plant would be a bad investment. Instead, American Crystal, as was the case with many other industry members, coveted Pacific Northwest's marketing allocation to support processing operations at plants outside of Washington State. When the deal with American Crystal was made, two parties besides Pacific Northwest asserted claims to the sale proceeds. Central Leasing owned the Moses Lake plant and any remaining equipment that it had not by then sold to

others. The equipment may still have included the diffuser and molasses desugaring equipment that CCC required American Crystal to acquire as a condition for its approval. But they were not listed on the Bill of Sale.

Scott Lybbert, the alter ego and sole owner of Washington Sugar, also claimed a share of the proceeds. He had the energy and drive to put the deal through, but owned none of the assets to be conveyed. He never acquired the marketing allocation, the use of the plant, or the needed capital to reopen it.

Pacific Northwest the essential "processor of beet sugar" owned what American Crystal's spokesman described to CCC as "immaterial assets." Its possession of rights to a marketing allocation existed only because CCC had failed to take action under 7 U.S.C. §1359dd(b)(2)(E), to eliminate it even though Pacific Northwest had by then permanently terminated operations. I have been unable to discern any essential purpose of the Act that was served by CCC's approval of the transfer. The approval was not given to assure that local growers would still have a processing outlet for their sugar beets. It was not given in order that a new processor would have entry to this industry that largely forecloses newcomers under government regulations. It was given to increase the marketing allocation of American Crystal, that already had the distinction of being the largest holder of sugar beet marketing allocation in America (AMAL-SM-73 at 2).

Moreover, the conditions CCC set for the transfer primarily show concern for administrative convenience. The parties waived rights to bring an action against USDA, CCC, and any Departmental Official in the event a third party successfully challenged the transfer in court; agreed to drop

Pacific Northwest's appeal of CCC's earlier adverse decision against it; and furnished settlement documents showing that American Crystal took actions to preclude the need for CCC to entertain any future applications by new entrants or others who might acquire or reopen the factory as a sugar beet processor, by securing the rights to make sugar at the facility and purchasing some equipment (including the diffuser and the molasses desugaring equipment) from Central Leasing that Pacific Northwest has used to make sugar (A.R. at 234-235).

The Act, as amended, intended that CCC take actions responsive to events. CCC through its day-to-day operations, knew that Pacific Northwest had ceased all operations, had sold its plant, and had not had a beet crop planted for processing in 2001, 2002, or 2003. In a public hearing held on June 16, 2003, the Executive Vice President of CCC, whose Reconsidered Determination is the subject of this appeal, was informed by virtually every beet sugar organization in the industry, including American Crystal, that Pacific Northwest had terminated operations and was unlikely to operate in the future (AMAL-SM-61 at 1-27).

Moreover, when American Crystal described the proposed transfer to CCC in July 2003, it stated (A.R. add At 89-90):

> American Crystal's Sugar Company (ACSC) is currently contemplating a transaction, which would effectively result in the allocation, currently owned by PNSC, being transferred to ACSC. As currently contemplated, substantially all of the assets of PNSC would be transferred to an intermediary company (Washington Sugar

> Company (WSC)). Since PNSC has already transferred ownership of its former processing facility to another party (Central Leasing, LLC), substantially all of the assets of PNSC consist mainly of the marketing allocation and some other generally immaterial assets. The next step in the transaction would be the immediate transfer of substantially all of the assets of WSC to ACSC or perhaps a 100% owned subsidiary of ACSC), The effect of the transaction would be to move the sugar marketing allocation from PNSC, through WSC, to ACSC.
>
> ASCS does not intend to process sugar beets in Moses Lake, WA after the completion of the transaction.

For CCC to say in light of all this information, as it did in-the Reconsidered Determination that Pacific Northwest was "terminated in conjunction with the sale of its assets" is untenable.

Moreover, CCC had duties as a fact finder. The facts before it appear sufficient for it to have declared Pacific Northwest to have permanently terminated operations. At very least, those facts were sufficient to require CCC to resolve gaps in its knowledge by conducting fact finding. By not taking the steps necessary to make the determination, CCC has encouraged what appears to be a sham transaction contrary to objectives of the Act This omission taken together with inconsistent treatment of applicants who had earlier sought the allocation's transfer, is conduct of the type the APA instructs reviewers to set aside for being "arbitrary, capricious, an abuse of discretion..." (5 U.S.C. §706(2)(A)).

CCC employed inconsistent standards for the

transfer of the allocation that it has not fully explained. American Crystal was only required to acquire some of Pacific Northwest's assets. But previously, both Washington Sugar and Amalgamated had been advised they would need to acquire virtually all of Pacific Northwest's assets including the factory.

CCC points out that Washington Sugar would have been a new entrant to the industry and for that reason different rules would apply. But Amalgamated's status was the same as American Crystal's and yet Amalgamated was required to meet a more stringent standard.

CCC also argues that the applicable statutory provisions are ambiguous and deference should be given to its interpretation. It is our policy to give some deference to interpretations by agency officials, who administer a statute's provisions. *See In re: Southern Minnesota Beet Sugar Cooperative, supra*, slip opinion, at 17. But since my function is take the evidence to determine whether CCC's actions were in accord with the law, the deference that may be accorded its actions is necessarily limited. Here, the way the provisions were interpreted and applied was in conflict with the language and objectives of the Act.

For these reasons, the Reconsidered Determination by the Executive Vice President of CCC that is the subject of the appeal is hereby reversed. Upon this decision becoming final and effective, CCC shall distribute, in future crop years, the amount of marketing allocation that was transferred to American Crystal from Pacific Northwest to all beet sugar processors on a pro rata basis in accordance with 7 U.S.C. §1359dd(b)(2)(E) of the Act.

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties and each of the Intervenors, and shall become final and effective 25 days after the Hearing Clerk has served the decision upon the Executive Vice President, unless a party or an Intervenor files an appeal petition within 20 days after service of this decision.

Done in Washington, DC
This 7th day of February 2005

s/
VICTOR W. PALMER
Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
1400 Independence Avenue, SW
Room 1081, South Building
Washington, D.C. 20250-9200

FILED
APR 28 2009
MOLLY C DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMALGAMATED SUGAR CO. LLC,
Plaintiff-Appellant,
v.
THOMAS VILSACK; DEPT. OF AGRICULTURE, et al.,
Defendants-Appellees,
AMERICAN CRYSTAL SUGAR COMPANY,
Intervenor-Appellee.

No. 07-35971
D.C. No. CV-06-00167-EJL
District of Idaho, Boise

ORDER

Before: WALLACE, TROTT and N.R. SMITH, Circuit Judges.

The panel has voted unanimously to deny Intervernor-Appellee's petition for panel rehearing. Judge N.R. Smith votes to deny the petition for rehearing en banc and Judge Wallace and Judge Trott so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

FILED

MAY 07 2009

MOLLY C. DWYER. CLERK OF COURT
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMALGAMATED SUGAR CO. LLC,
Plaintiff-Appellant,

v.

THOMAS VILSACK; DEPT. OF AGRICULTURE, et al.,

Defendants-Appellees,

AMERICAN CRYSTAL SUGAR COMPANY,
Intervenor-Appellee.

No. 07-35971
D.C. No. CV-06-00167-EJL
District of Idaho,
Boise

MANDATE

The judgment of this Court, entered 02/11/2009, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

Cost awarded to Appellant in the amount of $89.10.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court

/s/
By: Theresa Benitez
Deputy Clerk

7 U.S.C. § 1359aa (2002) – Definitions

In this subpart:

(1) Mainland State

The term "mainland State" means a State other than an offshore State.

(2) Offshore State

The term "offshore State" means a sugarcane producing State located outside of the continental United States.

(3) State

Notwithstanding section 1301 of this title, the term "State" means--

(A) a State;

(B) the District of Columbia; and

(C) the Commonwealth of Puerto Rico.

(4) United States

The term "United States", when used in a geographical sense, means all of the States.

7 U.S.C § 1359bb (2002) – Flexible marketing allotments for sugar

(a) Sugar estimates

(1) In general

Not later than August 1 before the beginning of each of the 2002 through 2007 crop years, the Secretary shall estimate--

(A) the quantity of sugar that will be consumed in the United States during the crop year;

(B) the quantity of sugar that would provide for reasonable carryover stocks;

(C) the quantity of sugar that will be available from carry-in stocks for consumption in the United States during the crop year;

(D) the quantity of sugar that will be available from the domestic processing of sugarcane and sugar beets; and

(E) the quantity of sugars, syrups, and molasses that will be imported for human consumption or to be used for the extraction of sugar for human consumption in the United States during the crop year, whether such articles are under a tariff-rate quota or are in excess or outside of a tariff-rate quota.

(2) Exclusion

The estimates under this subsection shall not apply to sugar imported for the production of polyhydric alcohol or to any sugar refined and reexported in refined form or in products containing sugar.

(3) Reestimates

The Secretary shall make reestimates of sugar consumption, stocks, production, and imports for a crop year as necessary, but no later than the beginning of each of the second through

fourth quarters of the crop year.

(b) Sugar allotments

(1) In general

By the beginning of each crop year, the Secretary shall establish for that crop year appropriate allotments under section 1359cc of this title for the marketing by processors of sugar processed from sugar beets and from domestically produced sugarcane at a level that the Secretary estimates will result in no forfeitures of sugar to the Commodity Credit Corporation under the loan program for sugar established under section 7272 of this title.

(2) Products

The Secretary may include sugar products, whose majority content is sucrose for human consumption, derived from sugarcane, sugar beets, molasses, or sugar in the allotments under paragraph (1) if the Secretary determines it to be appropriate for purposes of this subpart.

(c) Prohibitions

(1) In general

During any crop year or portion thereof for which marketing allotments have been established, no processor of sugar beets or sugarcane shall market a quantity of sugar in excess of the allocation established for such processor, except to enable another processor to fulfill an allocation established for such

other processor or to facilitate the exportation of such sugar.

(2) Civil penalty

Any processor who knowingly violates paragraph (1) shall be liable to the Commodity Credit Corporation for a civil penalty in an amount equal to 3 times the United States market value, at the time of the commission of the violation, of that quantity of sugar involved in the violation.

(3) Definition of market

For purposes of this subpart, the term "market" shall mean to sell or otherwise dispose of in commerce in the United States (including the forfeiture of sugar under the loan program for sugar under section 7272 of this title and, with respect to any integrated processor and refiner, the movement of raw cane sugar into the refining process).

7 U.S.C. § 1359cc (2002) – Establishment of flexible marketing allotments

(a) In general

The Secretary shall establish flexible marketing allotments for sugar for any crop year in which the allotments are required under section 1359bb(b) of this title in accordance with this section.

(b) Overall allotment quantity

(1) In general

The Secretary shall establish the overall quantity of sugar to be allotted for the crop year (in this subpart referred to as the "overall allotment quantity") by deducting from the sum of the estimated sugar consumption and reasonable carryover stocks (at the end of the crop year) for the crop year, as determined under section 1359bb(a) of this title--

(A) 1,532,000 short tons, raw value; and

(B) carry-in stocks of sugar, including sugar in Commodity Credit Corporation inventory.

(2) Adjustment

The Secretary shall adjust the overall allotment quantity to avoid the forfeiture of sugar to the Commodity Credit Corporation.

(c) Marketing allotment for sugar derived from sugar beets and sugar derived from sugarcane

The overall allotment quantity for the crop year shall be allotted between--

(1) sugar derived from sugar beets by establishing a marketing allotment for a crop year at a quantity equal to the product of multiplying the overall allotment quantity for the crop year by 54.35 percent; and

(2) sugar derived from sugarcane by establishing a marketing allotment for a crop year at a quantity equal to the product of multiplying the overall allotment quantity for the crop year by

45.65 percent.

(d) Filling cane sugar and beet sugar allotments

***

(2) Beet sugar

Each marketing allotment for beet sugar established under this section may only be filled with sugar domestically processed from sugar beets.

(e) State cane sugar allotments

(1) In general

The allotment for sugar derived from sugarcane shall be further allotted, among the States in the United States in which sugarcane is produced, after a hearing (if requested by the affected sugarcane processors and growers) and on such notice as the Secretary by regulation may prescribe, in a fair and equitable manner as provided in this subsection and section 1359dd(b)(1)(D) of this title.

(2) Offshore allotment

(A) Collectively

Prior to the allotment of sugar derived from sugarcane to any other State, 325,000 short tons, raw value shall be allotted to the offshore States.

(B) Individually

The collective offshore State allotment

provided for under subparagraph (A) shall be further allotted among the offshore States in which sugarcane is produced, after a hearing (if requested by the affected sugarcane processors and growers) and on such notice as the Secretary by regulation may prescribe, in a fair and equitable manner on the basis of--

(i) past marketings of sugar, based on the average of the 2 highest years of production of raw cane sugar from the 1996 through 2000 crops;

(ii) the ability of processors to market the sugar covered under the allotments for the crop year; and

(iii) past processings of sugar from sugarcane, based on the 3-year average of the 1998 through 2000 crop years.

(3) Mainland allotment

The allotment for sugar derived from sugarcane, less the amount provided for under paragraph (2), shall be allotted among the mainland States in the United States in which sugarcane is produced, after a hearing (if requested by the affected sugarcane processors and growers) and on such notice as the Secretary by regulation may prescribe, in a fair and equitable manner on the basis of--

(A) past marketings of sugar, based on

the average of the 2 highest years of production of raw cane sugar from the 1996 through 2000 crops;

(B) the ability of processors to market the sugar covered under the allotments for the crop year; and

(C) past processings of sugar from sugarcane, based on the 3 crop years with the greatest processings (in the mainland States collectively) during the 1991 through 2000 crop years.

(f) Filling cane sugar allotments

Except as provided in section 1359ee of this title, a State cane sugar allotment established under subsection (e) of this section for a crop year may be filled only with sugar processed from sugarcane grown in the State covered by the allotment.

(g) Adjustment of marketing allotments

(1) In general

The Secretary shall, based on reestimates under section 1359bb(a)(3) of this title, adjust upward or downward marketing allotments in a fair and equitable manner, as the Secretary determines appropriate, to reflect changes in estimated sugar consumption, stocks, production, or imports.

(2) Allocation to processors

In the case of any increase or decrease in an allotment, each allocation to a processor of the

allotment under section 1359dd of this title, and each proportionate share established with respect to the allotment under section 1359ff(c) of this title, shall be increased or decreased by the same percentage that the allotment is increased or decreased.

(3) Carry-over of reductions

Whenever a marketing allotment for a crop year is required to be reduced during the crop year under this subsection, if, at the time of the reduction, the quantity of sugar marketed exceeds the processor's reduced allocation, the allocation of an allotment next established for the processor shall be reduced by the quantity of the excess sugar marketed.

(h) Suspension of allotments

Whenever the Secretary estimates or reestimates under section 1359bb(a) of this title, or has reason to believe, that imports of sugars, syrups or molasses for human consumption or to be used for the extraction of sugar for human consumption, whether under a tariff-rate quota or in excess or outside of a tariff-rate quota, will exceed 1,532,000 short tons (raw value equivalent) (excluding any imports attributable to reassignment under paragraph (1)(D) or (2)(C) of section 1359ee(b) of this title), and that the imports would lead to a reduction of the overall allotment quantity, the Secretary shall suspend the marketing allotments established under this section until such time as the imports have been restricted, eliminated, or reduced to or below the level of 1,532,000 short tons (raw value equivalent).

7 U.S.C. § 1359dd (2002) – Allocation of marketing allotments

(a) Allocation to processors

Whenever marketing allotments are established for a crop year under section 1359cc of this title, in order to afford all interested persons an equitable opportunity to market sugar under an allotment, the Secretary shall allocate each such allotment among the processors covered by the allotment.

(b) Hearing and notice

***

(2) Beet sugar

(A) In general

Except as otherwise provided in this paragraph and sections 1359cc(g), 1359ee(b), and 1359ff(b) of this title, the Secretary shall make allocations for beet sugar among beet sugar processors for each crop year that allotments are in effect on the basis of the adjusted weighted average quantity of beet sugar produced by the processors for each of the 1998 through 2000 crop years, as determined under this paragraph.

(B) Quantity

The quantity of an allocation made for a beet sugar processor for a crop year under subparagraph (A) shall bear the same ratio to the quantity of allocations made for all beet sugar processors for the crop year as the adjusted weighted average quantity of

beet sugar produced by the processor (as determined under subparagraphs (C) and (D)) bears to the total of the adjusted weighted average quantities of beet sugar produced by all processors (as so determined).

(C) Weighted average quantity

Subject to subparagraph (D), the weighted quantity of beet sugar produced by a beet sugar processor during each of the 1998 through 2000 crop years shall be (as determined by the Secretary)--

(i) in the case of the 1998 crop year, 25 percent of the quantity of beet sugar produced by the processor during the crop year;

(ii) in the case of the 1999 crop year, 35 percent of the quantity of beet sugar produced by the processor during the crop year; and

(iii) in the case of the 2000 crop year, 40 percent of the quantity of beet sugar produced by the processor (including any quantity of sugar received from the Commodity Credit Corporation) during the crop year.

(D) Adjustments

(i) In general

The Secretary shall adjust the weighted average quantity of beet

sugar produced by a beet sugar processor during the 1998 through 2000 crop years under subparagraph (C) if the Secretary determines that the processor--

(I) during the 1996 through 2000 crop years, opened a sugar beet processing factory;

(II) during the 1998 through 2000 crop years, closed a sugar beet processing factory;

(III) during the 1998 through 2000 crop years, constructed a molasses desugarization facility; or

(IV) during the 1998 through 2000 crop years, suffered substantial quality losses on sugar beets stored during any such crop year.

(ii) Quantity

The quantity of beet sugar produced by a beet sugar processor under subparagraph (C) shall be--

(I) in the case of a processor that opened a sugar beet processing factory, increased by 1.25 percent of the total of the adjusted weighted average quantities of beet sugar produced by all processors during the 1998 through 2000 crop years (without consideration of any adjustment under this

subparagraph) for each sugar beet processing factory that is opened by the processor;

(II) in the case of a processor that closed a sugar beet processing factory, decreased by 1.25 percent of the total of the adjusted weighted average quantities of beet sugar produced by all processors during the 1998 through 2000 crop years (without consideration of any adjustment under this subparagraph) for each sugar beet processing factory that is closed by the processor;

(III) in the case of a processor that constructed a molasses desugarization facility, increased by 0.25 percent of the total of the adjusted weighted average quantities of beet sugar produced by all processors during the 1998 through 2000 crop years (without consideration of any adjustment under this subparagraph) for each molasses desugarization facility that is constructed by the processor; and

(IV) in the case of a processor that suffered substantial quality losses on stored sugar beets, increased by 1.25 percent of the total of the adjusted weighted average quantities of beet sugar produced

by all processors during the 1998 through 2000 crop years (without consideration of any adjustment under this subparagraph).

(E) Permanent termination of operations of a processor

If a processor of beet sugar has been dissolved, liquidated in a bankruptcy proceeding, or otherwise has permanently terminated operations (other than in conjunction with a sale or other disposition of the processor or the assets of the processor), the Secretary shall--

(i) eliminate the allocation of the processor provided under this section; and

(ii) distribute the allocation to other beet sugar processors on a pro rata basis.

(F) Sale of all assets of a processor to another processor

If a processor of beet sugar (or all of the assets of the processor) is sold to another processor of beet sugar, the Secretary shall transfer the allocation of the seller to the buyer unless the allocation has been distributed to other sugar beet processors under subparagraph (E).

(G) Sale of factories of a processor to another processor

(i) In general

Subject to subparagraphs (E) and (F), if 1 or more factories of a processor of beet sugar (but not all of the assets of the processor) are sold to another processor of beet sugar during a crop year, the Secretary shall assign a pro rata portion of the allocation of the seller to the allocation of the buyer to reflect the historical contribution of the production of the sold factory or factories to the total allocation of the seller.

(ii) Application of allocation

The assignment of the allocation under clause (i) shall apply--

(I) during the remainder of the crop year during which the sale described in clause (i) occurs (referred to in this subparagraph as the "initial crop year"); and

(II) each subsequent crop year (referred in this subparagraph as a "subsequent crop year"), subject to clause (iii).

(iii) Subsequent crop years

(I) In general

The assignment of the allocation under clause (i) shall apply during each subsequent crop year unless the acquired factory or factories continue in operation for less than

the initial crop year and the first subsequent crop year.

(II) Reassignment

If the acquired factory or factories do not continue in operation for the complete initial crop year and the first subsequent crop year, the Secretary shall reassign the temporary allocation to other processors of beet sugar on a pro rata basis.

(iv) Use of other factories to fill allocation

If the transferred allocation to the buyer for the purchased factory or factories cannot be filled by the production of the purchased factory or factories for the initial crop year or a subsequent crop year, the remainder of the transferred allocation may be filled by beet sugar produced by the buyer from other factories of the buyer.

(H) New entrants starting production or reopening factories

(i) In general

Except as provided by clause (ii), if an individual or entity that does not have an allocation of beet sugar under this subpart (referred to in this paragraph as a "new entrant") starts processing sugar beets after the date of

enactment of this subparagraph, or acquires and reopens a factory that produced beet sugar during previous crop years that (at the time of acquisition) has no allocation associated with the factory under this subpart, the Secretary shall--

(I) assign an allocation for beet sugar to the new entrant that provides a fair and equitable distribution of the allocations for beet sugar; and

(II) reduce the allocations for beet sugar of all other processors on a pro rata basis to reflect the new allocation.

(ii) Exception

If a new entrant acquires and reopens a factory that previously produced beet sugar from sugar beets and from sugar beet molasses but the factory last processed sugar beets during the 1997 crop year and the new entrant starts to process sugar beets at such factory after the date of enactment of this clause, the Secretary shall--

(I) assign an allocation for beet sugar to the new entrant that is not less than the greater of 1.67 percent of the total of the adjusted weighted average quantities of beet sugar produced by all processors during the 1998 through 2000 crop

years as determined under subsection (b)(2)(C) of this section, or 1,500,000 hundredweights; and

(II) reduce the allocations for beet sugar of all other processors on a pro rata basis to reflect the new allocation.

(I) New entrants acquiring ongoing factories with production history

If a new entrant acquires a factory that has production history during the period of the 1998 through 2000 crop years and that is producing beet sugar at the time the allocations are made from a processor that has an allocation of beet sugar, the Secretary shall transfer a portion of the allocation of the seller to the new entrant to reflect the historical contribution of the production of the sold factory to the total allocation of the seller.

7 U.S.C. § 1359ee (2002) – Reassignment of deficits

(a) Estimates of deficits

At any time allotments are in effect under this subpart, the Secretary, from time to time, shall determine whether (in view of then-current inventories of sugar, the estimated production of sugar and expected marketings, and other pertinent factors) any processor of sugarcane will be unable to market the sugar covered by the portion of the State cane sugar allotment allocated

to the processor and whether any processor of sugar beets will be unable to market sugar covered by the portion of the beet sugar allotment allocated to the processor.

(b) Reassignment of deficits

***

(2) Beet sugar

If the Secretary determines that a sugar beet processor who has been allocated a share of the beet sugar allotment will be unable to market that allocation--

(A) the Secretary first shall reassign the estimated quantity of the deficit to the allotments for other sugar beet processors, depending on the capacity of each other processor to fill the portion of the deficit to be assigned to it and taking into account the interests of producers served by the processors;

(B) if after the reassignments the deficit cannot be completely eliminated, the Secretary shall reassign the estimated quantity of the deficit to the Commodity Credit Corporation and shall sell such quantity of sugar from inventories of the Corporation unless the Secretary determines that such sales would have a significant effect on the price of sugar; and

(C) if after the reassignments and sales, the deficit cannot be completely eliminated, the Secretary shall reassign the remainder to imports.

(3) Corresponding increase

The allocation of each processor receiving a reassigned quantity of an allotment under this subsection for a crop year shall be increased to reflect the reassignment.

7 C.F.R. § 1435.2 (2004) – Definitions

The definitions set forth in this section are applicable for all purposes of program administration. Terms defined in part 718 of this title are also applicable.

***

Sugar beet processor means a person who commercially produces sugar, directly or indirectly, from sugar beets (including sugar produced from sugar beet molasses), has a viable processing facility, and a supply of sugar beets for the applicable allotment year.

***

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(2)

No. 09-129

Supreme Court, U.S.
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In The Supreme Court of the United States

AMERICAN CRYSTAL SUGAR COMPANY,

Petitioner,

v.

THE AMALGAMATED SUGAR COMPANY LLC,

and

THOMAS VILSACK, UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF THE AMALGAMATED SUGAR COMPANY LLC

JOHN MCCREEDY
Counsel of Record
General Counsel and Secretary
THE AMALGAMATED SUGAR COMPANY LLC
3184 Elder Street
Boise, Idaho 83705
(208) 383-6500

KEVIN BROSCH
CARLOS M. PAZ-SOLDAN
DTB ASSOCIATES, LLP
901 New York Avenue, NW, No. 12
Washington, DC 20001
(202) 684-2512

Counsel for Respondent
The Amalgamated Sugar Company LLC

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER STATEMENT OF QUESTIONS PRESENTED

Whether the court of appeals correctly concluded that the terms "processor" and "permanently terminated operations" in 7 U.S.C. §§ 1359dd(b)(2)(E)-(F) were not ambiguous and that the agency was therefore not entitled to *Chevron* deference.

Whether the court of appeals correctly concluded that an agency's interpretation of statutory terms that is inconsistent with the agency's own regulatory definition of those terms is not reasonable and not entitled to deference.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court, Respondent The Amalgamated Sugar Company LLC states that it is a Delaware limited liability company. The Snake River Sugar Company, an Oregon agricultural cooperative, and ASC Holdings, Inc., a Utah corporation, are the member owners of The Amalgamated Sugar Company LLC. There is no publicly held company that owns 10 percent or more of the membership interests of The Amalgamated Sugar Company LLC.

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 555 F.3d 816 (9th Cir. 2009) and is reprinted in the Appendix to the Petition ("Pet. App.") at 30. A petition for panel rehearing was denied and an amended opinion substituted by order dated April 6, 2009. The amended opinion is reported at 563 F.3d 822 (9th Cir. 2009) and is reprinted at Pet. App. 1.

The opinion of the District Court is reprinted at **No. 06-167**, 2007 WL 2612675 (D. Idaho Sept. 6, 2007) and at Pet. App. 56.

The decision of the Judicial Officer of the U.S. Department of Agriculture is reprinted at Pet. App. 69.

The decision of the Administrative Law Judge of the U.S. Department of Agriculture is reprinted at Pet. App. 100.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on February 11, 2009. A petition for rehearing en banc was denied April 28, 2009. The petition for writ of certiorari was filed on July 27, 2009. The jurisdiction of this Court was invoked by Petitioner under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938, *as amended*, 7 U.S.C. § 1359dd(b)(2)(E).

"(E) Permanent termination of operations of a processor

If a processor of beet sugar has been dissolved, liquidated in a bankruptcy proceeding, or otherwise has permanently terminated operations (other than in conjunction with a sale or other disposition of the processor or the assets of the processor), the Secretary shall –

***(i)** eliminate the allocation of the processor provided under this section; and*

***(ii)** distribute the allocation to other beet sugar processors on a pro rata basis. . . ."*

Section 359d(b)(2)(F) of the Agricultural Adjustment Act of 1938, *as amended*, 7 U.S.C. § 1359dd(b)(2)(F).

"(F) Sale of all assets of a processor to another processor

If a processor of beet sugar (or all of the assets of the processor) is sold to another processor of beet sugar, the Secretary shall transfer the allocation of the seller to the buyer unless the allocation has been distributed to other sugar beet processors under subparagraph (E)."

7 C.F.R. § 1435.2.

The definitions set forth in this section are applicable for all purposes of program administration. Terms defined in part 718 of this title are also applicable.

"Sugar beet processor means a person who commercially produces sugar, directly or indirectly, from sugar beets (including sugar produced from sugar beet molasses), has a viable processing facility, and a supply of sugar beets for the applicable allotment year.

[67 FR 54928, Aug. 26, 2002, as amended at 69 FR 55062, Sept. 13, 2004]"

INTRODUCTION

The petition for certiorari satisfies none of the criteria applicable for review by this Court. American Crystal Sugar Company ("Petitioner") mischaracterizes the holding of the Ninth Circuit Court of Appeals in this case, and the holding of this Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The case before this Court involves the interpretation of two subparagraphs of the Agricultural Adjustment Act (the "Act"), 7 U.S.C. § 1359dd(b)(2)(E) and 7 U.S.C. § 1359dd(b)(2)(F), as amended by Congress when it enacted the Farm Security and Rural Investment Act of 2002 (the "Farm Bill"). This is a case of first impression, and these provisions, when reviewed by the Ninth Circuit, were reviewed by a court of appeals for the first time.

Thus, there is no conflict among circuits in the interpretation of these statutory provisions that would require review by this Court.

Petitioner incorrectly asserts that the holding of the Ninth Circuit Court of Appeals in this case is in conflict with a prior decision of the Court of Appeals for the District of Columbia Circuit. Pet. App. 13. Petitioner's argument is based on a mischaracterization of the central holdings in this case.

The holdings of the Ninth Circuit in this case are that (1) the terms "processor" and "permanently terminated operations" in 7 U.S.C. §§ 1359dd(b)(2)(E) and (F) were unambiguous; and (2) the U.S. Department of Agriculture's (the "USDA") interpretation of those terms conflicted with the natural and ordinary meaning of those same terms as well as the USDA's own regulatory definition of them, and was, therefore, not entitled to *Chevron* deference because such interpretation was not reasonable. Pet. App. 21-22. Petitioner's contention that the Ninth Circuit allegedly announced a new "self-interest" rule that undercuts *Chevron*, Pet. App. 13-15, focuses on comments of the Ninth Circuit that were not central to its holding in this case, and, in any event, Petitioner misstates the basic holding in *Chevron*.

The Ninth Circuit's decision in this case is consistent with the decisions of both this Court and the circuit courts of appeals subsequent to *Chevron*. The petition should be denied.

STATEMENT

I. The Applicable Statutory Background.

A. The Act Establishes a Marketing Allocation System for Sugar Producers.

In 2002, Congress enacted the Flexible Marketing Allotments for Sugar ("FMAS") program (as part of the Farm Bill), which amended the Act to stabilize prices for domestically produced sugar. 7 U.S.C. § 1359aa, *et seq.* The Secretary of Agriculture (the "Secretary") was directed to establish domestic marketing allocations for cane sugar producers and beet sugar processors. The amount of sugar that any company can sell domestically now depends entirely on the size of its marketing allocation. Initial allocations were made to sugar beet processors based on historical production levels during the 1998-2000 crop years.

B. The Statute Requires That When a Processor Permanently Terminates Its Operations, Its Marketing Allocation Be Redistributed Pro Rata.

The statute requires the Secretary to eliminate a processor's allocation and to redistribute that allocation to all other processors if the processor is dissolved, liquidated or "otherwise has permanently terminated operations." 7 U.S.C. § 1359dd(b)(2)(E). The companion provision authorizes the Secretary to transfer the allocation to another sugar beet processor, but only if a "processor of beet sugar (or all of

the assets of the processor)" is sold to another processor of beet sugar.[1] 7 U.S.C. § 1359dd(b)(2)(F).

The USDA subsequently promulgated implementing regulations that defined the term "sugar beet processor" as an entity that (1) is commercially producing sugar from sugar beets, (2) has a viable processing facility and (3) has a supply of sugar beets for the applicable allotment year. 7 C.F.R. § 1435.2.

II. Factual Background.

Petitioner's Brief contains statements and factual allegations that were never accepted by the USDA Administrative Law Judge (the "ALJ"), the District Court or the Ninth Circuit, and that inaccurately present the factual findings in this case. The Amalgamated Sugar Company LLC ("Respondent") respectfully submits it is improper for Petitioner to ignore the findings of fact that have been made by the courts below and to attempt to "rewrite" the facts in this case to those that it prefers. Respondent asserts that the Statement of Factual and Procedural History in the opinion of the Ninth Circuit is an accurate, correct statement of the findings in this case and is fully supported by the record. *See* Pet. App. 5-11. The ALJ also presented a

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[1] The statutory subsections at issue use the terms "processor of beet sugar," "beet sugar processor" and "beet processor" interchangeably.

complete version of the findings of fact. Pet. App. 105-124. In summary, the key facts are as follows:

Pacific Northwest Sugar Company ("Pacific") operated a single plant in Moses Lake, Washington, and had received a beet sugar marketing allocation. Pet. App. 5. Pacific experienced significant financial problems and in January 2001, it shut down the plant and terminated processing operations. Pet. App. 5. Pacific had no sugar beet crop in 2002 or 2003 and never resumed operations. It terminated most of its employees. Pet. App. 5. In June 2001, Pacific sold its plant and equipment to Central Leasing, who owned the plant site and to whom Pacific was in substantial arrears on lease payments. Pet. App. 5. In July 2001, Pacific was administratively dissolved by the State of Washington. Pacific defaulted on a $20 million USDA guaranteed loan, resulting in a $12.1 million loss to the government. Pet. App. 7-8.

In October 2002, the USDA announced an allocation for Pacific in the succeeding crop years. Pet. App. 7. However, because Pacific was not operational and could not use the allocation, the USDA reallocated Pacific's share to other processors, much of it immediately at the beginning of the crop year. Pet. App. 7. On December 3, 2002, Pacific conveyed all interests in its marketing allocation and its production history to a new company called Washington Sugar Company ("WSC"), owned by Scott Lybbert. Pet. App. 8. Six months later, even though Pacific had conveyed its "interests" to WSC, and although Pacific had not used any of its 2002

allocation, a representative of Pacific attempted, at a USDA hearing in June 2003, to get Pacific's allocation increased. Pet. App. 8. The request was opposed by other processors, including Petitioner, and the USDA denied the request. Pet. App. 8.

In July 2003, Petitioner began negotiating to obtain the Pacific allocation. Pet. App. 8. Petitioner told the USDA that it was

> contemplating a transaction which would effectively result in the allocation, currently owned by [Pacific] being transferred to [American Crystal]. As currently contemplated, substantially all of the assets of [Pacific] would be transferred to an intermediary company [Washington Sugar]. Since [Pacific] has already transferred ownership of its former processing facility to another party [(Central Leasing LLC)], substantially all of the assets of Pacific consists [sic] mainly of the marketing allocation and some other generally immaterial assets. The next step in the transaction would be the immediate transfer of all of the assets of [Washington Sugar] to American Crystal. The effect of the transaction would be to move the sugar marketing allocation from [Pacific], through [Washington Sugar] to [American Crystal].

Pet. App. 9.

On July 30, 2003, Petitioner told the USDA's Commodity Credit Corporation (the "CCC") – a part of the USDA – that it was acquiring "ownership or

control of the assets (including the rights to the production history and the marketing allocations), associated with the Moses Lake, Washington sugar beet processing factory." Pet. App. 9. Petitioner told the USDA that it had no intentions of ever processing sugar at the old Pacific facility, which had not been in operation for two-and-a-half years. Pet. App. 8. Apparently realizing that WSC had never been given an allocation, the USDA replied, suggesting that Pacific be resurrected for the purposes of what the ALJ would later call a "sham transaction contrary to the objectives of the Act." Pet. App. 141. On August 28, 2003, the USDA told Petitioner: "We understand that American Crystal is purchasing all of the assets of Pacific Northwest, securing the rights to make sugar at the Pacific Northwest/Central Leasing factory site, and purchasing some of the sugar making equipment used by Pacific." Pet. App. 9-10. The USDA also required that the parties seeking the transfer drop appeals of certain administrative claims they had pending against the USDA. Pet. App. 10.

On September 8, 2003, Pacific, which had been out of business for two-and-a-half years, was hurriedly reinstated as a legal corporation with the State of Washington. Pet. App. 10. WSC executed a "revocation" of Pacific's previous transfer of rights to it, Petitioner purported to purchase Pacific's assets (which were nothing more than the company's production history and alleged "right" to an allocation) and the papers were sent to the USDA. Pet. App. 10. On September 16, 2003, the USDA informed

Petitioner that it had approved the alleged "sale" and that it would transfer Pacific's allocation to Petitioner beginning with the 2003 crop year. Pet. App. 11.

On December 4, 2003, Respondent filed a Petition for Review, administratively challenging the transfer. Pet. App. 11.

III. Proceedings Below

On February 7, 2005, the ALJ determined that Pacific had not been an operating company at the time of the transfer, and that the USDA had neglected, despite having clear evidence to the contrary, to determine that Pacific had terminated its operations, to eliminate Pacific's allocation and to redistribute the allocation as the law requires. Pet. App. 129, 137, 140-142. The ALJ rejected the USDA's claim that there had been a sale that justified its transfer decision and noted that by not taking the steps necessary to make the determination, the CCC had encouraged what appeared to be "a sham transaction" contrary to the objectives of the Act. Pet. App. 141. The ALJ held that the USDA's decision was arbitrary, capricious, an abuse of discretion, unsupported by evidence and contrary to the law. Pet. App. 141.

On February 28, 2005, the USDA appealed to the USDA's Judicial Officer who, without hearing oral argument, reversed the ALJ and ordered the USDA's transfer of the allocation reinstated. Pet. App. 72. The Judicial Officer specifically found that Pacific's sugar

beet processing operations had ceased in February of 2001 and had never resumed. Pet. App. 81. However, interpreting the term "processor of beet sugar" in 7 U.S.C. § 1359dd(b)(2)(F) to mean any entity with a marketing allocation, the Judicial Officer concluded that since the USDA had not, prior to September 2003, removed Pacific's marketing allocation, it remained a "processor of beet sugar." Pet. App. 83-84, 95-96. The Judicial Officer's decision did not mention or consider the USDA's implementing regulations, which contained a specific and contrary definition.

Respondent challenged the Judicial Officer's decision in the U.S. District Court for the District of Idaho. Pet. App. 56. The District Court entered summary judgment in favor of the USDA and Petitioner. Pet. App. 67-68. In its opinion, the District Court was troubled by the ALJ's determination that there was "no sale of the assets of the processor" in order to invoke a transfer of allocation under 7 U.S.C. § 1359dd(b)(2)(F) and by the Judicial Officer's ultimate conclusion that the sale had been "appropriate." Pet. App. 66-67. However, the District Court held that it was required to defer to the Judicial Officer's interpretation of the statute. Respondent then appealed to the Ninth Circuit Court of Appeals. Pet. App. 67.

The Ninth Circuit reversed the District Court after it concluded that the disputed provisions of the Act were unambiguous and that the District Court had erred in granting *Chevron* deference to the interpretation of the term "processor" advanced by

the USDA. Pet. App. 16-17. In explaining its reasoning, the Ninth Circuit held that a "processor" is an entity that processes sugar, as defined by the USDA's own regulations, and is entirely within the natural and ordinary meaning of the word. Pet. App. 21-22. The Ninth Circuit also found, based on the record, that Pacific had "permanently terminated operations" prior to and not in conjunction with the proposed sale of assets to Petitioner. Pet. App. 25. The Ninth Circuit, therefore, found that Pacific had not been a processor at the time USDA approved the transfer of Pacific's allocation to Petitioner. Pet. App. 16. On that basis, the Court concluded that the USDA had erred in approving the transfer of the allocation to Petitioner, and that the law required Pacific's sugar marketing allocation to be redistributed pro rata among all processors. Pet. App. 25.

The Ninth Circuit declined to rehear this case en banc.

REASONS FOR DENYING THE WRIT

The Ninth Circuit's essential holdings in this case are that the statutory term "processor" in 7 U.S.C. § 1359dd(b)(2)(E) is not ambiguous and has the normal and ordinary meaning of "one who processes," and because the term's meaning is not ambiguous, *Chevron* deference is inapplicable. Second, even if the term were ambiguous, USDA had already defined the term in its program regulations at 7

C.F.R. § 1435.2 and could not, therefore, interpret the term in a different and inconsistent manner in this case. Both of these central holdings are entirely consistent with this Court's holdings in *Chevron*. The Ninth Circuit did not "create a new test" based on an agency's self-interest, as Petitioner alleges. The Ninth Circuit's comments on the USDA's self-interest in this case create no new legal "test"; the Court noted, as a future caution to the USDA, that "*Chevron* deference may be inappropriate where, as here . . . the agency has a self-serving or pecuniary interest" but that cautionary statement is *dicta*, and is not the core holding in the case. Pet. App. 13. The Ninth Circuit's holdings are consistent with the settled precedent of this Court and the other circuit courts. There is, therefore, no circuit split on the legal questions presented by this case. For the above reasons this Court should deny certiorari.

I. The Ninth Circuit Correctly Held That the USDA Was Not Entitled to *Chevron* Deference.

The Ninth Circuit correctly held that because the statutory term "processor" was not ambiguous, the USDA's interpretation of that term was not entitled to any deference. Pet. App. 16-22. Petitioner incorrectly argues that the USDA's interpretation of the statutory term "processor" as an entity that had received a marketing allocation was "reasonable" and that *Chevron* required the Ninth Circuit to defer to

the USDA's interpretation of the statutory term. Pet. App. 21-23. But that is not the law.

A core teaching of this Court's decision in *Chevron* is that the first and most important step in construing a statute is to look to the statutory language itself. "If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-44. A reviewing court must, therefore, first look to the text of the statute to "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (*quoting United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989)).

In reviewing agency statutory construction, there is a "strong presumption that the plain language of the statute expresses congressional intent, [and] is rebutted only in rare and exceptional circumstances, when a contrary legislative intent is clearly expressed." *Ardestani v. I.N.S.*, 502 U.S. 129, 135-36 (1991) (*quoting Rubin v. United States,* 449 U.S. 424, 430 (1981)); *see also I.N.S. v. Cardoza-Fonseca,* 480 U.S. 421, 432 (1987). Courts "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U.S. 1, 9 (1962), and that "[a]bsent a clearly expressed legislative intention to

the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

The Ninth Circuit determined that Congress had not specifically defined the term "processor" in 7 U.S.C. § 1359dd(b)(2)(E), and that there was no evidence that the term was intended to have any special meaning different from what might ordinarily be understood. It concluded, as courts have traditionally concluded, that Congress meant the term to be interpreted in accordance with its plain and ordinary dictionary meaning. Pet. App. 18. The Court determined that the plain and ordinary meaning of the word "processor" is simply "one that processes." Pet. App. 18. This is entirely consistent with *Chevron*.

Chevron does not say that an agency's interpretation of a statute is always entitled to deference. Rather, *Chevron* stands for the proposition that when an agency defines a statutory term through the regulatory process, the definition in the agency's regulations is given controlling weight and is entitled to deference.

In *Chevron*, the issue before this Court was the meaning of the term "stationary source" in section 172(b)(6) of the Clean Air Act. Because Congress had not specifically defined that term, the Environmental Protection Agency (the "EPA") promulgated regulations that, *inter alia*, specifically defined "stationary source." Subsequently, the National Resources

Defense Council challenged the regulatory definition. This Court upheld the EPA, stating that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious and contrary to statute." *Chevron*, 467 U.S. at 843-44.

Applying *Chevron*'s teachings in this case, it follows that the USDA is entitled to deference only when it has interpreted the term "processor of sugar beets" in 7 U.S.C. § 1359dd(b)(2)(F) by regulation. The interpretation of the term "processor" that the USDA invented for the purposes of this case is not its regulatory definition, and in fact is plainly inconsistent with the definition of the term found in the USDA's own program regulations at 7 C.F.R. § 1435.2. Significantly, Petitioner makes no mention anywhere in its Brief of the USDA's program regulations.

Because the interpretation the USDA applied in this case was not developed "through the regulatory process," the USDA is entitled to no deference under *Chevron*. The USDA had previously defined "sugar beet processor" as "a person who commercially produces sugar, directly or indirectly, from sugar beets (including sugar produced from sugar beet molasses), has a viable processing facility, and a supply of sugar beets for the applicable allotment year." 7 C.F.R. § 1435.2. The USDA was not free to disregard its own

regulatory definitions. It is this Court's longstanding position that "it is incumbent upon agencies to follow their own procedures." *United States v. Caceres*, 440 U.S. 741, 752 (1979) (*quoting Morton v. Ruiz*, 415 U.S. 199, 235 (1974)). And as long as a regulation "is extant it has the force of law." *United States v. Nixon*, 418 U.S. 683, 695 (1974).

Where an agency is interpreting a statute it is charged to administer, the question is whether its interpretation is based on a permissible construction of the statute. This Court has held that an agency's interpretation of its own regulations is not entitled to deference if it is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 453, 461-63 (1997) (*quoting Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)). The "courts are the final authorities on issues of statutory construction" and "they must reject administrative constructions . . . that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981). The Ninth Circuit was, therefore, correct in rejecting the USDA's inconsistent interpretation of its own regulations.

II. Petitioner Misrepresents Holdings of the Ninth Circuit and This Court.

A. The Ninth Circuit's Holding Does Not Conflict with the D.C. Circuit's Decisions.

Petitioner argues that the Ninth Circuit overreached by erecting a new rule, under which *Chevron* deference may be inappropriate, where "(1) the agency has a self-serving or pecuniary interest in advancing a particular interpretation of a statute, *and* (2) the construction advanced by the agency is arguably inconsistent with Congressional intent." Pet. App. 14. The dispositive words here are "may be inappropriate." This alleged "new rule" comes from the D.C. Circuit case *National Fuel Gas Supply v. Federal Energy Regulatory Commission*, 811 F.2d 1563, 1571 (D.C. Cir. 1987), and was cited by the Ninth Circuit as part of its discussion concerning the possible motivations behind the USDA's anomalous failure to abide by its own implementing regulations. Nowhere in the Ninth Circuit's opinion, however, is the *National Fuel Gas* standard cited as a requirement for rebutting deference under *Chevron*.

Petitioner refers to the Ninth Circuit's various citations out of context and fails to note that the *National Fuel Gas* standard cited in the Ninth Circuit opinion is immediately preceded by the Ninth Circuit's acknowledgement that "self-interest alone gives rise to no automatic rebuttal of deference" (quoting the D.C. Circuit in *Independent Petroleum Association of America v. DeWitt*, 279 F.3d 1036, 1040

(D.C. Cir. 1987)). Pet. App. 24. This is a clear recognition by the Ninth Circuit that agency self-interest by itself does not trigger a rebuttal of deference. There is therefore no conflict between the Ninth Circuit and the D.C. Circuit on this point, as Petitioner asserts. Pet. App. 16.

B. The Ninth Circuit's Holding Does Not Conflict with This Court's Decision in *Chevron*.

In a further attempt to secure the review of this Court, Petitioner mischaracterizes the Ninth Circuit's opinion, and its acknowledgement of the D.C. Circuit's holdings on the matter of agency self-interest, by arguing that the Ninth Circuit's holding "will erode, if not overrule" this Court's decision in *Chevron*. Pet. App. 17. Petitioner expounds at great length over the D.C. Circuit cases on agency self-interest, Pet. App. 13-18, cited by the Ninth Circuit in one paragraph. Pet. App. 24. Petitioner suggests that the Ninth Circuit's decision will "throw the [sugar] industry into chaos" and "threatens to bring uncertainty and increased litigation challenging agency decisions." Pet. App. 30 As is evident from a review of the Ninth Circuit opinion, the one-paragraph discussion of the USDA's self-interest in this case is mere *dicta* that does not threaten agency decision making and does not warrant review by this Court.

In fact, the Ninth Circuit's holding was based on a straightforward application of *Chevron*. The Ninth Circuit determined at the outset of its opinion that (1) the term at issue, "processor," was unambiguous and used in a manner consistent with its natural and ordinary meaning, and (2) the USDA's interpretation of this term not only conflicted with the ordinary meaning of the word but also conflicted with the USDA's own regulatory definition of the term. Pet. App. 21-22. As a result, the Ninth Circuit determined that the USDA's interpretation was not entitled to deference and reversed the District Court's decision. Pet. App. 4. This decision is consistent with the Act and this Court's holdings in *Chevron*, provides all sugar beet processors with certainty and predictability in the correct interpretation and application of the Act, and presents no threat to agency decision making.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

Respectfully submitted,

JOHN MCCREEDY
Counsel of Record
General Counsel and Secretary
THE AMALGAMATED SUGAR COMPANY LLC
3184 Elder Street
Boise, Idaho 83705
(208) 383-6500

KEVIN BROSCH
CARLOS M. PAZ-SOLDAN
DTB ASSOCIATES, LLP
901 New York Avenue, NW, No. 12
Washington, DC 20001
(202) 684-2512

Counsel for Respondent
The Amalgamated Sugar Company LLC

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In the Supreme Court of the United States

AMERICAN CRYSTAL SUGAR COMPANY,
Petitioner,

v.

THE AMALGAMATED SUGAR COMPANY LLC,
Respondent,

and

THOMAS VILSACK, UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION OF AMERICAN CRYSTAL SUGAR COMPANY

David P. Bunde
Counsel of Record
Emily E. Duke
Sarah C.S. McLaren
Timothy M. O'Shea
FREDRIKSON & BYRON, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, Minnesota 55402-1425
(612) 492-7000
Counsel for Petitioner

2009 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

CORPORATE DISCLOSURE STATEMENT

Petitioner, American Crystal Sugar Company, incorporates the corporate disclosure statement in its Petition for a Writ of Certiorari.

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INTRODUCTION

Under *Chevron*, an agency decision must be upheld if: (1) the statute at issue is ambiguous; and, (2) the agency's interpretation of the statute is reasonable and consistent with the statute. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-44 (1984).

The terms "processor" and "permanent termination" are ambiguous as used in the statute and regulations. Since the USDA's interpretation of these terms was reasonable and consistent with the statute, the Ninth Circuit should have deferred to the agency's interpretation as the District Court did.

Instead, the Ninth Circuit decided that the statute was not ambiguous, found that the agency acted unreasonably, and substituted its own interpretation of the statute. Moreover, the Court of Appeals set forth a novel interpretation of how courts should review agency decisions, which, if upheld, would undercut the entire concept of *Chevron* deference.

Respondent tries to distance itself from the Ninth Circuit's discussion of *Chevron* by labeling it mere dicta. But the Ninth Circuit wrote that agency interpretations **"must be subject to greater scrutiny"** in cases of alleged agency self interest. Pet. App. 24. (Emphasis added). Such "greater scrutiny" is not what this Court contemplated in *Chevron*. In fact, the Ninth Circuit did apply greater scrutiny in this case, which is why this Court should grant this Petition.

ARGUMENT

I. The Statute is Ambiguous.

A. The Term "Processor," as Used in the Statutes and Regulations, is Ambiguous.

The term "processor" is not used consistently in the statute and the regulations. The Court of Appeals found the "plain meaning" to be "an entity who processes sugar." While this may seem reasonable in the abstract, such a definition does not fit the statute and the regulations.

The statute uses the term "processor" to refer to, among other things, entities which have been dissolved, permanently terminated operations, or sold all of their assets. 7 U.S.C. § 1359dd(b)(2)(E)-(F). None of these entities would be currently processing sugar and therefore would not fit the Court of Appeals' definition.

Similarly, such entities would not fit the definition of "processor" contained in the regulations. The regulation defines a "processor" as one who produces sugar, has a viable processing facility, and a supply of sugar beets for the applicable year. 7 C.F.R. § 1435.2. A sugar beet processor with a temporary disruption in its facility or crop supply cannot be a "processor" under this definition.

American Crystal's purchase of Pacific's assets has been reviewed at five separate levels. Of these, only the Ninth Circuit concluded that Pacific was not a processor in September 2003 when this purchase took place. The Ninth Circuit disagreed with: the vice president of the CCC, the ALJ (who, like the

Ninth Circuit, ruled against this transaction, but still held that Pacific Northwest was a "processor"), the Judicial Officer, and the District Court. By definition an ambiguous term can be read more than one way by reasonable minds. When such a statutory term can reasonably be construed in more than one way, the Court may not substitute its own interpretation for a reasonable interpretation by the agency.

B. "Permanent Termination" is Also Unclear.

The real question in this case is how to handle a sugar beet processor, like Pacific Northwest, (which had been actively processing sugar from 1998 through early 2001), but had ceased processing. The statute and the regulations do not cover this situation. The question of when a processor's temporary cessation should be deemed to be a permanent termination is left up to the agency. As long as the agency acts reasonably in handling such a situation, consistent with the statute, the courts should not interfere.

Pacific Northwest was obviously in dire financial straits. It had not processed sugar since 2001, had defaulted on its lease, and lost most of its equipment and employees. The company had not given up hope, however. During 2002-2003 Pacific met with most of the leading agricultural companies, including nearly the entire sugar industry, and many other lenders seeking financing and/or a partnership to allow it to resume operations. From the record in this case, one cannot conclude that Pacific had permanently terminated operations. Whether it would have been successful in resuming operations was not the question; instead, as long as the company was still

struggling to survive, it cannot be said to have permanently terminated operations.

As the USDA recognized, the statute provided a mechanism to deal with this situation. If a processor is unable to produce sugar in a given year, the USDA temporarily reassigns the allocations. 7 U.S.C. § 1359ee(b)(2). Pacific Northwest is not the only company which has had such a temporary reassignment. AR, Vol. 5, ACS-35.[1] This mechanism was specifically built into the statute for these purposes.

It was reasonable for the USDA to not immediately remove Pacific's allocation during the first year that the statute was in effect. The USDA did exactly as the statute intended. It closely monitored Pacific's situation to see if the company would survive. Pacific's allocation was redistributed to those in the industry (including Amalgamated) with the need for additional allocation. These companies received Pacific's allocation without charge and benefited enormously from it. (American Crystal did not receive any redistributed allocation during 2002-2003).

These same companies, who benefited from Pacific's allocation, never argued that Pacific was not a processor during 2002-2003. Nor did they claim at the time that Pacific should have been declared permanently terminated. Only after American Crystal spent almost $7 million to purchase Pacific's assets, did Amalgamated complain that Pacific should have been declared permanently terminated.

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[1] "AR" refers to the administrative record.

II. The USDA Acted Reasonably in Interpreting the Act and Managing Pacific Northwest's Situation.

Because Pacific did process sugar in the statutory base period from 1998 through 2000, Pacific earned its initial allocation. The statute required that the USDA grant Pacific its initial allocation of 2.7% of the sugar beet market. 7 U.S.C. § 1359 dd(b)(2)(A).

The first crop year under the Act began in October 2002. After granting Pacific its allocation, the USDA temporarily redistributed the allocation to other companies in the market with excess capacity. The USDA closely watched Pacific's situation during the first year of the Act. The agency received many inquiries from other companies about potential acquisitions of Pacific. Indeed, one USDA official stated that so many companies were interested in acquiring Pacific that he considered putting information about this situation on the USDA website. AR, Vol. 5, ACS-38.

Pacific's situation did not drag out for long. By the summer of 2003 – just nine months into the first crop year – Pacific had reached a tentative agreement with American Crystal. After consulting with American Crystal and Pacific, and carefully analyzing the proposed transaction, the USDA required that the parties restructure the transaction. When the parties complied with the USDA's requirements, the agency approved the transfer of Pacific's allocation. Pacific's growers and creditors benefited from this transaction and some of Pacific's huge debt load was repaid.

III. The Ninth Circuit Failed to Follow *Chevron*.

A. The Ninth Circuit Failed to Defer to the Agency.

In order to avoid *Chevron* deference, the Ninth Circuit substituted its own interpretation of the statute for that of the agency. It disagreed with the vice president of the CCC, the ALJ, the Judicial Officer, and the District Court as to whether Pacific was a processor.

In finding that Pacific should have been declared permanently terminated, the Court ignored both the facts and the law. The Court looked to Pacific's financial distress, but failed to credit Pacific's efforts to try to resume processing. Indeed, Pacific even petitioned the USDA to increase its allocation in 2003. AR, Vol. 5, ACS – 23. The Court of Appeals did not explain why a company that had permanently terminated operations would ask for an increase in its allocation.

The Court also ignored the statute allowing the USDA to temporarily reassign an allocation when a processor is unable to use it. The USDA fully understood Pacific's financial distress. But rather than immediately declaring Pacific to have permanently terminated operations, the agency followed the statute by temporarily reassigning the allocation. The USDA monitored the situation for the next several months while nearly the entire sugar industry negotiated with Pacific. Then, in the summer of 2003 – – less than one year into the new Act – – American Crystal and Pacific negotiated an

asset purchase which brought closure to the situation and benefited Pacific's growers and creditors.

The USDA did not benefit from this transaction. It understood that none of the USDA's loans would be repaid. The USDA did **not** have a self interest in this case. Contrary to the Ninth Circuit's discussion on agency self interest, there was nothing in this transaction that benefited the USDA. Instead, the agency used its expertise to interpret the statute consistent with Congressional intent. The USDA acted reasonably and appropriately.

B. The Ninth Circuit's Self Interest Rule Conflicts with *Chevron*.

The Ninth Circuit did not overturn the District Court merely because it disagreed with the definition of "processor" or "permanent termination." In reading the Ninth Circuit's opinion, one cannot escape the conclusion that the Court believed that the USDA had some kind of self interest at work. It is not a defensible reading of the Ninth Circuit opinion to merely label the Court's discussion of agency self interest as dicta. In its own words, the Court sets forth a new test requiring "greater scrutiny" for agency interpretation in cases of alleged self interest:

> "Where an agency interprets or administers a statute in a way that furthers its own administrative or financial interests, the agency interpretation must be subject to greater scrutiny to ensure that it is consistent with Congressional intent and the underlying purpose of the statute." Pet. App. 24.

The Court goes on to say that self interest alone does not automatically rebut *Chevron* deference.

However, the Court concludes by saying that deference may be inappropriate if an agency has a self serving interest and the agency's construction is "arguably inconsistent" with Congressional intent. Pet. App. 24. This is the most interesting and the most unsupportable part of the Court's opinion. The Ninth Circuit says that *Chevron* deference may not be appropriate even if an agency's interpretation is arguably consistent with Congressional intent. Because if something is arguably inconsistent, then it is also arguably consistent.

To hold that an agency interpretation that is arguably consistent with Congressional intent is still not subject to deference would completely undercut *Chevron*. The whole point of *Chevron* is that an agency's interpretation should be upheld if it is arguably consistent with Congressional intent. Essentially the Ninth Circuit would allow courts to substitute their own judgment for that of agencies whenever a Court finds that an agency might have a self serving interest at stake. If such a new interpretation of *Chevron* is to be enacted, it is not the job of the Ninth Circuit to do so. This Court should grant this Petition to review the Ninth Circuit's decision which undercuts 25 years worth of precedent under *Chevron*.

Respectfully submitted,

David P. Bunde
Counsel of Record
Emily E. Duke
Sarah C.S. McLaren
Timothy M. O'Shea
FREDRIKSON & BYRON, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, Minnesota 55402-1425
(612) 492-7000

Counsel for Petitioner